

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	
)	
Request for Review of a Decision of the)	File No. SLD-256606
Universal Service Administrator by)	
)	
IBM Corporation, regarding Services)	
Provided to El Paso Independent School)	
District during Funding Year 2001)	

Request for Review

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March 19, 2012

Summary

In this Request for Review, IBM Corporation (“IBM”) seeks *de novo* review and reversal of a decision (the “SLD Decision”) of the Universal Service Administrative Corporation (“USAC”) substantially denying IBM’s appeal of a Commitment Adjustment (“COMAD”) issued by the USAC Schools and Libraries Division (“SLD”) in 2007. The COMAD sought return of approximately \$19.448 million in funding disbursed from the Schools and Libraries Universal Service Support Mechanism (“E-rate”) for services provided in Funding Year 2001. The SLD Decision, issued more than a decade after the original funding commitment, represents the latest chapter in SLD’s interminable and unjustified quest for return of E-rate funds that were properly disbursed to IBM in 2001 and 2002. At this late date, IBM now calls on the Commission to put an end to this matter and direct SLD to cease its recovery efforts.

IBM offers its critique and criticisms of SLD processes and procedures in this Request for Review in a constructive spirit to attempt to assist the Commission and SLD in strengthening the E-rate program. Despite SLD’s errors in connection with the COMAD at issue here, IBM remains a firm supporter of the E-rate Program, and is committed to continuing to participate in bringing the latest information technology-based learning tools to our Nation’s schoolchildren and educators. The importance of that goal cannot be overstated.

Nevertheless, for the reasons discussed herein, this COMAD cannot be sustained. This Request for Review initially discusses two failings that render the COMAD invalid as it applies to all five funding requests at issue. First, it is the product of an *ultra vires* process that purports to imbue a private, not-for-profit corporation, USAC, which

privately collects and distributes non-governmental funds, with powers that are reserved for the use of federal government agencies in seeking recovery of federal funds and payment of federal debts.

Second, in issuing the COMAD, SLD failed to follow the Commission's rules governing the COMAD process. In particular, SLD failed to follow the Commission's directive to make the initial determination as to which party bears liability for the recovery only after considering factors such as which party was in better position to prevent the statutory or rule violation, and which party committed the act or omission that forms the basis for the statutory or rule violation. In the COMAD at issue here, SLD articulates virtually no basis for its liability determinations, relying instead on conclusory assertions largely placing liability with IBM.

In addition, with respect to the maintenance, video, and web and file server funding requests, SLD fails to follow the Commission's rules governing the development of cost allocation methods for separating eligible from ineligible costs, both by rejecting IBM and EPISD proposals based on a misapplication of the Commission's cost allocation criteria, and by imposing its own cost allocation methods on the parties despite what should be a process driven by the applicant and service provider.

This Request for Review then discusses specific errors that SLD committed in connection with each of the individual funding requests at issue. Contrary to the finding in the SLD Decision, with respect to the maintenance funding commitment at issue here, the COMAD was issued after the expiration of the Commission's five-year administrative limitations period and therefore should be rescinded as untimely. The Commission adopted the administrative limitations period to provide a measure of

finality and repose to the E-rate beneficiaries and services providers alike with respect to E-rate funding decisions. Thereafter, USAC compounded the timeliness problem by taking over four years to decide IBM's appeal of the COMAD. As a result, this Request for Review addresses E-rate services that were provided a decade ago, during the 2001-2002 E-rate funding year. This extreme delay hampers both the Commission and the parties, as employees move on, services and equipment are supplanted or replaced, technology evolves, memories fade, and, particularly in the world of E-rate, programmatic rules are refined and expanded, obscuring the state of the law at the time of the conduct under review.

In addition, the COMAD, as it applies to each of these funding requests, cannot stand because it rests on a misunderstanding of the scope and operation of the applicable statements of work, and improper revisionist interpretations of the Commission orders and programmatic rules in effect for Funding Year 2001.

As a result, IBM requests that the Commission reverse the SLD Decision, vacate the COMAD, and direct USAC to cease all collection efforts with respect to these 2001 funding commitments.

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Request for Review of IBM Corporation

IBM Corporation (“IBM”) hereby seeks *de novo* Commission review and reversal of the Administrator’s Decision on Appeal of the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”), dated January 19, 2012 (the “SLD Decision”),¹ to the extent that the SLD Decision denied IBM’s appeal of an earlier Commitment Adjustment (“COMAD”)² seeking recovery of approximately \$19.448 million in Schools and Libraries Universal Service Support Mechanism (“E-rate”) support. The SLD Decision relates to the following funding commitments made for equipment and services that IBM provided to the El Paso Independent School District (“EPISD”) in FY2001:

Funding Request No.	Subject	Recovery Sought
648793	Maintenance	\$16,402,072.35
648758	Web Access	\$1,279,631.59
648729	Video	\$742,075.13
648960	Web and File Servers	\$843,575.00 ³
648646	E-Mail	\$62,240.03 ⁴

¹ See Letter from SLD to Cynthia B. Schultz, Patton Boggs LLP, “Administrator’s Decision on Appeal – Funding Year 2001-2002” (Jan. 19, 2012) (the “SLD Decision”), attached as **Exhibit A**, hereto.

² See **Exhibit B**, hereto.

³ IBM has recently learned that EPISD apparently paid 50 percent of this amount in 2007.

This support was approved and disbursed a decade ago pursuant to properly issued E-rate funding commitments.

SLD's recovery efforts are untimely and unfounded. *First*, the COMAD process followed by USAC is fatally flawed, rendering the COMAD invalid. *Second*, contrary to the finding in the SLD Decision, the COMAD, as it relates to Funding Request No. 648793 (Maintenance), is untimely because it was issued more than five years after IBM's final delivery of service for Funding Year 2001, in violation of the Commission's administrative limitations period. *Third*, in the case of the Funding Request Nos. 648793 (Maintenance), 648729 (Video), 648960 (File Servers), 648646 (E-Mail), and 648758 (Web Access) USAC has failed to identify with the required specificity any actual violation of the statutes or federal regulations governing the Commission's E-rate Program in support of its COMAD. Rather, in each case, the COMAD relies on purported violations of SLD programmatic requirements based on a clear misunderstanding of the scope of the EPISD's Item 21 attachments, the parties' applicable Statements of Work, the rules governing the E-rate Program in 2001, and the requirements of the Commission COMAD process. Finally, the SLD fails adequately to support its initial determination, in connection with the COMAD, to place virtually all of the responsibility for such violations on IBM. By failing to consider, investigate, and discuss the factors identified by the Commission as relevant to SLD's determination as to the party responsible for the violation, SLD fails to discharge this responsibility in accord

⁴ This amount reflects SLD's partial grant of IBM's appeal, reducing the COMAD amount for this FRN from \$180,792.47.

with the Commission's directives and deprives IBM of the right to argue the liability issue before being confronted by a COMAD.

The SLD Decision, therefore, improperly denied IBM's appeal⁵ of the COMAD at issue here. As discussed below, the Commission should reverse the SLD Decision, insofar as it affirmed the COMAD, and direct SLD to cease all efforts to recover funding committed in connection with the EPISD FY2001 Form 471 Application (No. 256606).

I. Introduction and Background

A. Legal Framework as of 2001

In 2001, the E-rate Program was still in its infancy, as it was just entering its fourth funding year. Many of SLD's programmatic procedures and Commission policies and rule refinements that have become well established today simply did not exist then and, in many cases, E-rate applicants and service providers alike were left to make their best good faith efforts as to the eligibility of specific equipment and services for E-rate support. The Commission had issued its original *Universal Service Order* establishing the now-familiar framework of eligible telecommunications services, Internet access, and internal connections.⁶ Yet, that Order contained only the barest guidance on what specific products and services would be eligible for support, and under what circumstances. With respect to internal connections, the Commission provided prospective participants in the E-rate Program with little more than the guiding principle that:

⁵ See **Exhibit C**, hereto.

⁶ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, FCC 97-157, 12 FCC Rcd 8776 ¶ 426 *et. seq.* (1997) ("*Universal Service Order*") (subsequent history omitted).

[A] given service is eligible for support as a component of the institution's internal connections only if that piece of equipment is necessary to transport information all the way to individual classrooms. That is, if the service is an essential element in the transmission of information within the school or library, we will classify it as an element of internal connections and will permit schools and libraries to receive a discount on its installation and maintenance for which the telecommunications carrier may be compensated from universal service support mechanisms⁷

While the Commission went on to discuss the application of this principle to certain specific items of equipment, such as file servers, that discussion mainly foreshadowed the difficulty that SLD and future E-rate Program participants alike would have in determining whether a particular service or piece of equipment should be considered a “necessary” or “essential element” of the delivery of information to classrooms such that it would be eligible for support.

The Eligible Services List (“ESL”), at this time, was a creation of SLD. The earliest ESLs indicated what specific components were eligible, such as routers, hubs, file servers, and so on, and specified the paragraphs in the Commission’s 1997 *Universal Service Order* that substantiated USAC’s eligibility determinations. Applicants and service providers, in general, were expected to refer to the ESL for guidance as to SLD’s understanding of applicable Commission rules and orders, and in order to determine how to prepare Requests for Proposals, bid responses, and funding requests. SLD reviewers, likewise, used the ESL as their tool in determining whether a particular technology proposed by an applicant could receive funding.

When presented with funding requests in 2001 and continuing to this day, SLD undertakes a rigorous, three-step review to evaluate the eligibility of each element of the

⁷ *Id.* at ¶ 459.

request. First is the initial review, in which SLD's contractor evaluates all aspects of a Form 471 application, Item 21 Attachments, and associated funding requests. Questions that arise as a result of this initial review can be posed to the applicant for a response. Second, when this review is complete, the Form 471 application undergoes a Final Review, which checks to ensure that all funding requests are consistent with FCC rules and USAC processes. Third, a Quality Assurance review ensures that proper decisions have been made on the previous steps. After these reviews are complete, the Form 471 application is associated with a funding wave, where final consideration is given to whether E-rate funds will be provided for appropriate funding requests.

What differed in 2001, as compared to subsequent years, was the level of detailed information and experience used to make eligibility determinations. In 2001, even the ESL, today a central feature of the E-rate Program that forms the backbone of any eligibility analysis, was not a formal Commission-approved document subject to annual public comment, but an evolving SLD working tool that was being revised on a weekly or monthly basis by SLD and its contractor. Not until April 2003 did the Commission formally direct USAC to "develop and test as a pilot program an online list for internal connections equipment" in keeping with a specific set of seven eligibility principles articulated contemporaneously by the Commission.⁸ And, not until December 2003 did

⁸ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 03-101, 18 FCC Rcd 9202 ¶¶ 35-36 (2003).

the Commission adopt a formal process for approving and updating the ESL at the Commission level, rather than by SLD fiat.⁹

As a result, as the Commission has acknowledged, even in 2003, **“the only way an applicant can determine whether a particular service or product is eligible under our current rules is to seek funding for that service or product, and then seek review of the Administrator's decision to deny discounts.”**¹⁰ Given the rudimentary eligibility framework in place in 2001, USAC's current effort to recover costs for services approved and delivered a decade ago is wholly baseless.

Even the cost allocation process, on which SLD relied in computing the COMAD amounts in this case underwent significant transformation in the period between Funding Year 2001, when SLD issued the funding commitments, and FY2007, when the COMAD arrived. In FY2001, the cost allocation process was an SLD processing procedure used in connection with initial funding requests. Only in 2003 did the Commission articulate a cost allocation policy and codify it in its rules.¹¹ Under those rules, when a product or service has mixed eligibility, that is, some features or functions are E-rate-eligible and some are not, then the applicant or service provider may submit a cost allocation that separates the eligible and ineligible portions. In this way, E-rate funds are only used to fund eligible products and services.

⁹ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-323, 18 FCC Rcd 26912 ¶¶ 40 (2003) (“*Third Report and Order*”).

¹⁰ *Third Report and Order*, at ¶ 40 (emphasis added).

¹¹ *Second Report and Order*, at ¶ 38 (codification of the 30 percent policy); *Third Report and Order*, at ¶¶ 36-39 (cost allocation must have a tangible basis and the price for the eligible portion must be the most cost effective means of receiving the eligible service).

As with any new undertaking, over time, the Commission and SLD have gained experience with the provision of E-rate support, and were able to expand and refine the eligibility rules governing the Program. Even by 2004, when SLD first questioned its funding of EPISD's FY2001 internal connections funding requests, evolving views and new, more restrictive Commission orders had shifted its perspective. It is essential, however, in reviewing this matter, to look through the eyes of the applicants and service providers in FY2001. By doing so, the Commission will correctly discern that SLD's 2001 funding commitment to EPISD was not the product of a too-cursory review, but an informed SLD judgment largely ratifying the conclusions of EPISD and IBM that the contracted services were eligible under the E-rate Program rules in effect at the time.

B. IBM and EPISD Internal Connections Transactions

It is important to recognize that, as Program applicants and service providers attempted to navigate the new E-rate Program in FY2001, they were guided by the vision of opportunity the Program offered to revamp the nation's educational infrastructure. E-rate promised a huge opportunity for needy schools to obtain highly valuable communication technologies that were previously unattainable due to budget constraints. IBM and other service providers answered the call, despite the uncertainties reflected in the still-evolving program rules. This is a critical point. What may be lost in inaccurate narrative about "waste" or "abuse" is that IBM and others worked in good faith to realize the intended benefits of the program for the nation's children within their best understanding of the E-rate rules in place at the time.

For the FY2001-2002 E-Rate funding year, EPISD served over 60,000 students and had over 8000 employees. It operated from roughly 100 locations, including some

90 different schools, in addition to the District Offices and other locations. At that time, the entire EPISD network operation was utterly inadequate to meet the District's far-flung and growing demands, more akin to the technological equivalent of a single lane dirt road. EPISD recognized the need to expand and modernize its information technology ("IT") infrastructure and services in order to meet the growing needs of its educational mission. Because of the size and complexity of EPISD's needs, such an undertaking was only possible for the economically disadvantaged school district with the support of E-rate funding.

With E-rate funding appropriately focused on the less-advantaged schools such as those that make up the E-rate FY2001 FCC Form 471 application at issue, IBM and EPISD worked to leverage the resources of E-rate to provide EPISD with state-of-the-art IT capabilities commensurate with the eligibility requirements that would fundamentally transform the school district's ability to fulfill its educational mission on behalf of its children. As later explained:

Many school districts have required substantial investments in recent years to upgrade their network infrastructures so that they could meet their educational objectives and prepare their students for the networked world. But deploying a modern enterprise network is not a simple task. For example, a district with 50,000 students plus thousands of teachers and administrators has networking requirements that are at least as complex as those of a small city.¹²

IBM, one of the nation's premier providers of IT products and services, is a critically valuable leader in bringing such state-of-the-art technology to our Nation's schools that

¹² Problems with the E-rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of our Nation's Schools to the Internet Part 3, Hearing before the Subcomm. on Oversight and Investigations of the House Comm. On Energy and Commerce, 108th Cong., Ser. No. 108-124 (Sept. 22, 2004), at 248 (testimony of Christopher G. Caine, Vice President, Government Programs, IBM) ("*IBM E-rate Testimony*").

rose to the challenge. Together, IBM and EPISD hoped in 2001 to create a model of excellence that would showcase the possibilities that E-rate funding could create, catapulting the learning tools available to students dramatically into the new millennium. EPISD would widen and pave the dirt road through the advancement of information technology that would serve as an inspiration to schools across the western Texas region.

Following a competitive bidding process, IBM and EPISD entered into contracts in 2001 for IBM to provide certain Priority 2 IT products and services to EPISD for the upcoming FY2001-2002 school year. Thereafter, on January 18, 2001, EPISD filed Form 471 No. 256606 (the “EPISD FY2001 Form 471”)¹³ with SLD requesting internal connections and Internet access equipment and services to be provided with E-rate funding. Attached to this Form 471 was detailed Item 21 information concerning the tasks to be undertaken in connection with each funding request.

The EPISD FY2001 Form 471 contained nine separate funding requests, each of which were subject to the rigorous review process described above. Following EPISD’s submission of the 2001 FY2001 Form 471, SLD and its contractor conducted a detailed analysis of the EPISD funding requests, exploring numerous questions with the applicant as part of that review. The rigor of this review is reflected in the Funding Commitment Decision Letter (“FCDL”),¹⁴ which was issued eight months later, on September 28, 2001, and which contains significant remarks about subtractions SLD made for ineligible functionality:

¹³ See **Exhibit D**, hereto.

¹⁴ See **Exhibit E**, hereto.

For FRN 648594 (Internet Access) the FCDL indicates that the “dollar requested were reduced for products/services received outside the current funding year.”

For FRN 648646 (E-mail) the FCDL indicates that the “dollars requested were reduced to remove the ineligible products: Data Cartridges, and Cleaning Cartridge.”

For FRN 648729 (Video) the FCDL indicates that the “dollars requested were reduced to remove the ineligible products: IP/TV Control Servers.”

For FRN 648758 (Web Access) the FCDL indicates that the “dollars requested were reduced to remove the ineligible products: Education Card, and 2/3 of multi-year Service Suite Advanced maintenance.”

SLD’s review would have had to be thorough for these detailed conclusions to be made.

As part of this full review, five funding requests, including the Maintenance FRN were **“approved as submitted.”**

Relying on SLD’s issuance of a positive FCDL, EPISD and IBM proceeded to perform their respective obligations under the contracts. IBM delivered the equipment and services specified in the Scope of Work, as set forth in the respective Item 21s, receiving payment both from USAC for the discounted share and EPISD for the non-discounted share.

With respect to the funding requests at issue in this Request for Review, according to invoicing records, IBM completed delivery of the services on June 30, 2002, with respect to services covered by Funding Request No. 648793 (Maintenance),¹⁵ and on or before September 30, 2002, with respect to the remaining funding requests. Years later, in a letter dated September 16, 2004, SLD raised a series of questions regarding its original decision to issue funding commitments for certain of the funding requests

¹⁵ See final invoice provided as **Exhibit F**, hereto.

included in the EPISD FY2001 Form 471 application.¹⁶ More than three years later, following additional communications and correspondence with both IBM and EPISD, on September 25, 2007, SLD issued the COMAD at issue here, reducing or revoking five of its original funding commitments. In response to IBM's appeal, SLD reduced the COMAD amount for the E-mail FRN, No. 648646, from \$180,792.47 to \$62,240.03, but otherwise affirmed the COMAD. This Request for Review ensued.

IBM has believed at all times that its FY2001 EPISD E-rate funding is consistent with SLD's programmatic requirements and the Commission's E-rate rules and regulations. Further, as discussed below, IBM believes that the COMAD should be rescinded in full and all funding commitments reinstated.

During the course of its correspondence with USAC from 2004 to 2007, IBM nevertheless made many different cost allocation and other proposals in an attempt to resolve the matter with USAC. These proposals do not represent IBM's agreement that any services were ineligible or that cost allocation is necessary or appropriate. This appeal addresses only those points raised in the SLD Decision and, to the extent incorporated therein, the COMAD and Further Explanation Letter.

II. The COMAD Exceeds USAC's Legal Authority (FRN 648793, 648758, 648729, 648960, 648646)

A. USAC Lacks Authority to Order Recovery of E-rate Funds and Must Proceed as a Private Plaintiff under Contract Law

The COMAD is fatally flawed because the Commission's orders establishing the recovery process USAC follows, and on which the COMAD is based, lacks a proper

¹⁶ See Letter from George McDonald, SLD, to Bob Richter, IBM (Sept. 16, 2004) ("SLD Sept. 16, 2004 Letter"), attached as **Exhibit G**, hereto.

statutory foundation. In creating the recovery process, the Commission has consistently and erroneously relied on statutes and judicial opinions applicable to recovery of federal funds by federal government actors or their agents. USAC's efforts to recover universal service funding lack both of these essential conditions.

Two separate federal circuit courts of appeal have found that USAC is neither a governmental agency nor an agent of the government. As explained by the United States Court of Appeals for the Ninth Circuit, “[w]hile the FCC has substantial authority to determine USAC's budget and approve its disbursements . . . , USAC is not simply holding funds in the USF as the FCC's agent.”¹⁷ After examining the issue, the United States Court of Appeals for the First Circuit similarly found that, “[universal service] funds are not distributed by a federal agency but by USAC, a private nonprofit corporation, subject to regulation.”¹⁸ This structural problem has persisted since the Commission first created the universal service administrative structure, as the General Accounting Office found in 1998.¹⁹

Further, the universal service funds USAC holds are not federal funds. Continuing in its *Incomnet* decision, the Ninth Circuit also found that “[t]he FCC only exercises power

¹⁷ *USAC v. Post-Confirmation Committee of Unsecured Creditors of Incomnet Communications Corp. (In re Incomnet)*, 463 F.3d 1064, 1074 (9th Cir. 2006).

¹⁸ *City of Springfield v. Ostrander (In re LAN Tamers, Inc.)*, 329 F.3d 204, 206 (1st Cir. 2003).

¹⁹ General Accounting Office, *Telecommunications: FCC Lacked Authority to Create Corporations to Administer Universal Service Programs*, GAO/T-RCED/OGC-98-84 (Mar. 31, 1998), at 15-16 (The Administrator is “not subject to statutes that impose obligations on federal entities and federal employees in the areas of employment practices, procurement, lobbying and political activity, ethics, and disclosure of information to the public Finally, as established by the Commission, Congress has no direct oversight over the corporation[]. The corporation[] do[es] not provide budget information directly to Congress, but rather [is] accountable to the Commission.”).

over the fund indirectly, essentially by overseeing USAC; it has no ability to control the funds in the USF through direct seizure or discretionary spending.”²⁰ Similarly, the First Circuit stated flatly, “[t]he USF monies are not appropriated federal funds.”²¹

Thus, the Commission erroneously relied on the authority of the federal government to seek recovery of funds improperly disbursed from the U.S. Treasury.²² While the Commission acknowledged that the Supreme Court precedent on which the Commission relied, *OPM V. Richmond*,²³ “involved disbursements from the Treasury rather than, as here, a Congressionally authorized fund,”²⁴ the Commission asserted that reliance was justified based on a mistaken belief that USAC was an agent of the Commission.²⁵ The First and Ninth Circuits have now conclusively held that such is not the case.

²⁰ *Incomnet*, 463 F.3d at 1074.

²¹ *LAN Tamers*, 329 F.3d at 206; *see also Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 427 (5th Cir. 1999) (universal service contributions are not a tax); *see also* S. Rep. No. 108-144 (“Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Bill”), at 170-71 (2003) (“The recommendation does not include the \$3,000,000 requested for the Office of Inspector General [OIG] to hire contractors to conduct audits of the Universal Service Fund [USF] and the E-Rate Program. The use of appropriated funds for these audits is inappropriate, as the USF is maintained in accounts outside the Treasury and is administered by a not-for-profit corporation rather than a Federal agency. The Committee agrees with the FCC’s Inspector General, who stated in an April, 2002 memorandum: ‘It is appropriate and consistent with applicable regulations to utilize the Universal Service Fund to fund [the FCC’s] oversight of the Schools and Libraries [E-Rate] Program.’ The Committee directs the FCC to utilize funds in the USF to pay for costs associated with the auditing of the USF.”) (language incorporated by reference into final conference report, H.R. Rep. 108-401, at 636 (2003)).

²² *Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket No. 97-21, Order, FCC 99-291, 1999 WL 809695 ¶ 7 (1999) (“*Commitment Adjustment Order*”).

²³ 496 U.S. 414 (1990).

²⁴ *Commitment Adjustment Order*, at ¶ 7.

²⁵ *Id.* (“[O]nly in extreme circumstances could an agent, such as USAC, bind the government – here the FCC – to actions that violate a federal statute.”).

In a similar fashion, the Commission has erroneously relied on the Debt Collection Improvement Act of 1996 (“DCIA”) as authority for USAC to order E-rate Program applicants and service providers to return funds that it later determines were improperly disbursed.²⁶ On its face, that statute applies only to “funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency.”²⁷ USAC’s employees and its contractors are not government employees and, as such, they are not “official[s] of the Federal Government.” Indeed, when it implemented the DCIA, the Commission acknowledged as much, stating in the first line of its Order that its rule revisions “govern[] the collection of claims owed the United States” and citing the DCIA definition.²⁸ Despite the mismatch between the statute, which governs claims owed to the federal government, and its application to USAC, a private, not-for-profit corporation administering a privately collected fund, the Commission reiterated its reliance on the DCIA in 2004, when it revisited and revised the COMAD framework.²⁹

The Commission has also relied on Depression-era Supreme Court cases, such as *Wurts*, holding that “the government can recover funds which have been wrongfully, erroneously, or illegally paid, and no statute is required to authorize the government to do

²⁶ *Id.*, at ¶10 (citing Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996)).

²⁷ 31 U.S.C. § 3701(b)(1).

²⁸ *Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors*, MD Docket No. 02-339, Report and Order, FCC 04-72, 19 FCC Rcd 6540 ¶ 1 (2004).

²⁹ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, FCC 04-190, 19 FCC Rcd 15808 ¶ 15 (2004) (“*Fifth Report and Order*”).

so”³⁰ in an attempt to justify USAC’s authority to order recovery through the COMAD process. The Commission’s reliance on the *Wurts* case is misplaced, as it too applies in situations involving recovery of federal funds paid out by agents of the federal government, a situation not present here. The actual holding of the *Wurts* Court, on which the Commission relies, was that, “[t]he Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid.”³¹ By paraphrasing *Wurts* in the passive voice, the Commission omits two critical factors on which the *Wurts* holding rests: that the funds in question must be federal funds paid out by the federal government or its agents, and that the power to order recovery of such wrongfully-paid funds likewise rests only with the federal government or its agents. As discussed above, two federal appellate courts have now held that the Commission’s control over USAC’s performance of its responsibilities in connection with the collection and distribution of universal service support funds is sufficiently indirect that USAC does *not* act as an agent of the Commission. Moreover, these courts have also found that universal service funds, which are collected and distributed privately by USAC outside of the U.S. Treasury, are *not* appropriated or directly controlled by the federal government.

The Commission’s COMAD process itself illustrates the misfit created by the Commission’s reliance on authorities designed to govern federal government recovery. In the *Commitment Adjustment Implementation Order*, the Commission found that, in cases where USAC and the Commission are unable to obtain repayment of a commitment

³⁰ *Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting L.P.*, CC Docket No. 02-6, Order, FCC 11-175 ¶¶ 22-23 (2011) (“*Lakehills*”) (citing *U.S. v. Wurts*, 303 U.S. 414, 415 (1938)).

³¹ 303 U.S. at 415.

adjustment issued by USAC, “[a]fter 180 days of nonpayment, the Commission will transfer the claim against the service provider to the Secretary of the Treasury for further collection action.”³² Given that the monies to be recovered are not appropriated federal funds, and were not disbursed by a federal government agency, it appears plain that the Secretary of the Treasury would have no role in the recovery process.

Despite these concerns with the COMAD process as currently conceived, IBM shares the Commission’s concern that funds disbursed by USAC in clear error should be recovered. However, because USAC was not created as a governmental entity, but rather as a private, non-profit corporation privately collecting and distributing funds that it holds in its own bank accounts, USAC may not use tools uniquely available to the federal government, such as the imposition of the Commission’s “red light rule” established to implement the DCIA.³³

B. The COMAD Fails to Allege a Violation of a Federal Statute or Federal Regulations, as Required

Even putting aside the infirmities with the COMAD process discussed above, in the absence of any violation of the Communications Act, USAC lacks authority to seek recovery of previously disbursed E-rate funding or otherwise sanction an E-rate applicant or service provider. On this basis alone, the Commission must direct SLD to rescind its COMAD and reinstate funding for EPISD’s FRNs at issue here.

The Commission’s *Commitment Adjustment Order* gave USAC the authority to issue COMADs and seek recovery of support payments disbursed in error only in cases

³² *Commitment Adjustment Implementation Order*, at ¶ 16.

³³ For example, just as any other private party to a contract, in a case of a breach, USAC may still issue payment demands and proceed as a private plaintiff under available legal theories.

where such disbursement violates a provision of a federal statute.³⁴ The Commission did *not* grant USAC the power to issue COMADs where its disbursement violates only a Commission rule, regulation, or order. While the Commission has acknowledged that, “since then, USAC has implemented this process for statutory and rule violations,” such implementation goes beyond the authority the Commission purported to grant in 1999.

There is even less authority to seek recovery based on violations of USAC policy, such as that reflected in the 2001 versions of the ESL, which were mere SLD working documents that lacked the imprimatur of Commission approval it has today. In 2001, the ESL was a creation of USAC. When the Commission issued an order changing or clarifying eligibility, then SLD would update the ESL to communicate this new information. Additionally, SLD would issue a new version of the ESL if it felt that new wording would improve an understanding of current eligibility, as then created by USAC.

In issuing the *COMAD Order*, the Commission drew guidance from the Appropriations Clause of the U.S. Constitution,³⁵ as interpreted by the Supreme Court. As the Supreme Court explained, this Clause prohibits payment of federal government

³⁴ *Commitment Adjustment Order*, at ¶ 7 (“We, therefore, direct USAC, pursuant to sections 54.702 and 54.705 of the Commission's rules, and with close Commission oversight, to adjust funding commitments made to schools and libraries where disbursement of funds associated with those commitments would result in *violations of a federal statute*.”) (emphasis added); *see also Fifth Report and Order*, at ¶ 15 (“[T]he Commission adopted the *Commitment Adjustment Order* in 1999, which directed the Administrator to recover funds that, in the first year of the program, were committed to schools and libraries in violation of the Telecommunications Act of 1996 Subsequently, in 2000, the Commission adopted the *Commitment Adjustment Implementation Order*, which set up a framework for recovering funds committed or disbursed in violation of the statute”).

³⁵ U.S. Const. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

funds when such payment, “would be in direct contravention of the federal statute upon which [the payee’s] ultimate claim to the funds must rest.”³⁶

While acknowledging that payments of E-rate support do not involve disbursements from the Treasury, the Commission concluded that payment of E-rate support for services or to providers that are ineligible under the Communications Act would impermissibly “grant . . . a money remedy that Congress has not authorized.”³⁷ But that conclusion misses the mark. It is true that the Universal Service Fund exists pursuant to authority granted by Congress. Without more, however, that fact does not permit USAC to exercise powers reserved to the federal government to order repayment of funds disbursed in error, just as *OPM v. Richmond* does not prohibit payment of universal service funding when it states that “[m]oney may be paid out only through an appropriation made by law.”³⁸

The Commission has recently relied on *Schweiker v. Hansen*,³⁹ as authority for USAC to issue COMADs for violations of Commission rules. This reliance is to no avail. Like *OPM V. Richmond*, that case involves federal funds being distributed by a governmental authority, two essential prerequisites not present here. Further, even assuming that the Commission could grant some power to issue COMADs for violations of administrative rules⁴⁰ to USAC, the Commission has failed to grant the necessary authority in this case. Although USAC’s COMAD implementation plan included references to

³⁶ *OPM v. Richmond*, 496 U.S. 414, 424 (1990).

³⁷ *COMAD Order*, at ¶ 7 (*quoting Richmond*, 496 U.S. at 426) (alteration in original).

³⁸ *Richmond*, 496 U.S. at 424.

³⁹ 450 U.S. 785 (1981).

⁴⁰ *See Lakehills*, at ¶¶ 22-24.

Commission rule violations, the Commission merely reiterated that, “[a]s explained in the *Commitment Adjustment Order*, both the Debt Collection Improvement Act (DCIA) and the Commission's rules require collection of any disbursements it made *in violation of the Act*”⁴¹ when it approved the plan.

Moreover, in the COMAD at issue here, SLD failed even to assert that the funding requests in the FY2001 Form 471 violate the Communications Act or any federal regulation. SLD’s justification for the COMAD, contained in a companion Further Explanation Letter, attached hereto as **Exhibit H**, relies solely on purported violations of SLD programmatic rules and Commission orders, many of which were issued only after the FCDL had been issued and the EPISD contract was fully performed. These USAC programmatic rules, in particular, necessarily lack the force and effect of law, given that USAC is neither a governmental body nor an agency of the Commission⁴² and that neither the Commission nor Congress has delegated policymaking authority to USAC.⁴³ As a result, they cannot alone form the basis for a COMAD.⁴⁴

⁴¹ *Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket No. 97-21, Order, FCC 00-350, 15 FCC Rcd. 22975 (2000), at ¶ 3.

⁴² *Incomnet*, 463 F.3d at 1074; *LAN Tamers*, 329 F.3d at 206.

⁴³ *Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket No. 97-21, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21, and Eighth Order on Reconsideration in CC Docket No. 96-45, FCC 98-306, 13 FCC Rcd. 25058 (1998), at ¶ 16 (“USAC's function under the revised structure will be exclusively administrative. USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”).

⁴⁴ Government Accountability Office, *Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program*, GAO-05-151 (Feb. 9, 2005), at 27 (“The FCC IG has expressed concern over situations where USAC administrative procedures have not been formally codified because commission staff have stated that, in such situations, there is generally no legal basis to recover funds from applicants that failed to comply with the USAC administrative procedures.”).

C. The COMAD Fails to State a Violation with the Required Level of Specificity

Even putting aside questions of SLD's authority to issue the COMAD under review here, a careful examination of the purported bases for the COMAD reveals that it is not adequately supported. It is well established that, before denying or withdrawing funding, SLD must establish with specificity the precise conduct of an E-rate applicant or service provider that it contends violates the Commission's rules, and the precise violation that occurred.⁴⁵ In doing so, USAC must "provide the applicant with any and all grounds for denial"⁴⁶ after "sufficiently examining whether the Commission's rules were actually violated."⁴⁷ In this regard, the COMAD falls woefully short. One searches the COMAD and associated Further Explanation Letter in vain for any reference to an IBM violation of a statute or federal regulation in effect in 2001.

⁴⁵ See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technologies San Antonio, TX, et al., and Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, FCC 06-55, 21 FCC Rcd 5348 (2006) ("Pattern Analysis Remand Order"), at ¶ 1 (USAC improperly denied funding "without sufficiently examining whether the Commission's rules were violated"), ¶ 6 (USAC must support findings of violations with "applicant-specific evaluations"), ¶ 7 (USAC "should not issue summary denials"), ¶ 11 (USAC must issue an award or denial based on a "complete review and analysis" of the applicant's conduct).

⁴⁶ *Requests for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al. Columbia, Louisiana, and Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449, 23 FCC Rcd 2784, ¶ 2 n.5 (2008) ("Caldwell Parish"); see also *Requests for Review and Waiver of Decisions of the Universal Service Administrator by State of Arkansas, Department of Information Systems, Little Rock, Arkansas, et al.*, Order, 23 FCC Rcd 9373, ¶ 1 n.5 (2008); *Requests for Review of the Decision of the Universal Service Administrator by District of Columbia Public Schools*, Order, 23 FCC Rcd 15585, ¶ 7 n.39 (2008); *Review of Decisions of the Universal Service Administrator by Colegio Nuestra Senora del Carmen, Hatillo, Puerto Rico, et al.*, Order, 23 FCC Rcd 15568, ¶ 18 n.62; *Request for Review of a Decision of the Universal Service Administrator by Albert Lea Area Schools, Albert Lea, Minnesota, et al.*, Order, 24 FCC Rcd 4533, ¶ 11, n.51 (2009).

⁴⁷ *Caldwell Parish*, at ¶ 7.

That the COMAD at issue here fails to allege a violation of any specific statutory provision or Commission rule with the required specificity is unsurprising. In FY2001, the E-rate Program was still in its infancy, and SLD administered the E-rate Program largely using a set of “home-grown” programmatic rules through which it operationalized the Commission guidance contained in the *Universal Service Order* to the best of its ability. While these policies permitted the infant Program to function, they did not have the force of law. As the Program evolved thereafter, the Commission proceeded to fill in the framework of the E-rate rules and requirements, largely through interpretive orders, not by codifying requirements in the Code of Federal Regulations. Further, many substantive determinations as to the scope and eligibility of specific equipment and services for E-rate support have evolved through revisions to the ESL in every funding year since the inception of the E-rate Program.

III. SLD Failed to Follow Commission Rules Governing Cost Allocation and Assessment of Liability (FRN 648793, 648758, 648729, 648960, 648646)

A. SLD Must Articulate an Explicit Justification for Its Decision to Allocate Liability to IBM

In the COMAD, SLD failed to comply with the Commission’s directive for it to allocate liability between the applicant and service provider based on explicit consideration of specific factors. In directing SLD to pursue recovery, the Commission directed SLD to “make the determination, in the first instance, to whom recovery should be directed in individual cases,” as required by the Commission.⁴⁸ In doing so, the Commission directed SLD to consider factors including which party was in better

⁴⁸ *Fourth Report and Order*, at ¶ 15.

position to prevent the statutory or rule violation, and which party committed the act or omission that forms the basis for the statutory or rule violation.⁴⁹ In this case, SLD made no specific investigation of these factors, and provided little or no discussion of its liability determinations in the COMAD and SLD Decision deciding IBM's COMAD appeal.

The net result of SLD's failure to investigate and allocate liability in connection with the COMADs it issues is to sow discord between applicants and service providers, undermining these business relationships and, ultimately, the goals of the E-rate Program. This case provides a prime example of the unfortunate fallout from SLD's failures. With minimal discussion, SLD assigned shared responsibility to IBM and EPISD with respect to the COMAD for Funding Request 648960 (file servers), and full responsibility to IBM for the remainder of the purported violations, including the Funding Request Nos. 648758 (Web and File Access) and 648646 (E-Mail). In each case, both IBM and EPISD were parties to the applicable Statements of Work. Those Statements of Work, in turn, were the product of Requests for Proposals issued by EPISD, and further negotiations between the parties. EPISD had final authority and control over the Item 21 Attachments. And EPISD was as capable as IBM of evaluating the eligibility of services under the programmatic rules in effect at the time.

By allocating liability without adequate investigation or discussion, SLD fails to engage in the reasoned decision-making that is the hallmark of transparency essential to the administration of the multibillion-dollar Universal Service Fund. In doing so, SLD

⁴⁹ *Id.*

forces the parties on appeal to argue the liability issue against one another, even as they argue that neither has done anything wrong.

In this case, the problem is further complicated by EPISD's decision not to file an initial appeal of the 2007 COMAD directed to it, but to unilaterally pay fifty percent of the COMAD amount asserted by USAC. IBM learned of this payment only when, by chance, IBM stumbled upon EPISD's pending Petition for Waiver filed in response to the SLD Decision to seek relief from any further liability.⁵⁰ Because, as discussed below, IBM demonstrates that the parties' conduct did not violate E-rate rules, IBM believes that the Commission should order USAC to refund EPISD's payment and discontinue all further collection attempts immediately. In any event, as discussed below, SLD must base its determination of liability on an assessment of the relative culpability of the parties using the factors identified by the Commission, and not, as the EPISD Request for Waiver would have it, on the claimed fact that, "IBM is one of the world's wealthiest corporations, and its prospects for the future look bright."⁵¹

B. SLD May Not Impose Its Own Cost Allocation Methodology on the Parties

In the COMAD, SLD repeatedly and improperly imposed cost allocation methodologies of its own design on EPISD and IBM. The specific shortcomings in these methodologies will be discussed in connection with individual funding requests below. SLD's COMAD reflects two overarching failures, however. First, SLD failed properly to

⁵⁰ *Request for Waiver in connection with the Universal Service Administrator's Demand for Payment by El Paso Independent School District, El Paso, Texas*, CC Docket No. 02-6, Request for Waiver, File No. SLD-256606 (filed Feb. 15, 2012) ("EPISD Request for Waiver").

⁵¹ EPISD Request for Waiver, at 4.

apply the criteria in the Commission's rules for evaluating cost allocation methodologies, namely that the cost allocation be based on tangible criteria, and that the eligible portion be the most cost effective means of receiving the supported service. Second, SLD failed to follow the consensus-based approach contemplated by the Commission's cost allocation rule.

The Commission's rules require that a cost allocation meet two conditions. It must (1) have a "tangible basis," and (2) the eligible portion must be the most cost-effective means of receiving the eligible service.⁵² SLD's website discusses the cost allocation process, as follows:

Several methods of cost allocation can be used, but they must meet the criteria of being based on tangible criteria that provide a realistic result. The price for the eligible portion must be the most cost-effective means of receiving the eligible service.⁵³

SLD's "realistic result" criterion appears to be either a holdover from its earlier, informal policy, or an attempt to reformulate and reiterate the Commission's cost effectiveness requirement. Although IBM does not disagree with the view that the result of a cost allocation should be realistic, SLD's reliance on this standard as independent from the Commission's prescribed test finds no basis in the Commission's rules or in the *Third Report and Order*. As illustrated here, SLD's heavy reliance on its own subjective and result-driven judgment as to whether the result of a cost allocation is "realistic" reduces

⁵² See 47 C.F.R. § 54.504(e)(1) ("*Ineligible components*. If a product or service contains ineligible components, costs must be allocated to the extent that a clear delineation can be made between the eligible and ineligible components. The delineation must have a tangible basis, and the price for the eligible portion must be the most cost-effective means of receiving the eligible service.").

⁵³ See <http://www.usac.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx>.

the Commission's objective rule to a "Goldilocks" test over which SLD holds practically unchecked sway. Thus, by elevating "realistic result" to essentially the status of a third uncodified element of the cost allocation rule, SLD has arrogated to itself policymaking power that it is not permitted to exercise.⁵⁴

Further, by imposing its own cost allocation methodology on the parties, rather than by limiting its role to evaluation and critique of cost allocation methodologies proposed by the parties, SLD overstepped the limits imposed by the Commission's rules. As USAC acknowledges, "applicants are expected to provide cost allocations to USAC," following which "USAC reviewers will evaluate whether the cost allocation meets the criteria of being based on tangible criteria that provides a realistic result."⁵⁵ Thus, the applicant and service provider drive the development of the cost allocation methodology, using a flexible cost allocation approach contemplated by the Commission in the *Third*

⁵⁴ The examples SLD provides on its website clearly illustrate that the "realistic result" criterion is superfluous and represents little more than SLD's veiled attempt to exercise prohibited policymaking authority. To wit, SLD states:

Assume a computer-based voice mail system includes an ineligible printer. Statistics are submitted that indicate that the hard drive capacity of the computer is used only 0.005% of the time for printing purposes. Although this is tangible information, it does not provide a realistic result.

(<http://www.usac.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx>). In this example, SLD's concerns are already fully accommodated within the Commission's prescribed criteria. SLD could find that the tangible criterion used (proportion of time the hard drive capacity is used for printing purposes) is too narrow to measure accurately the overall system resources involved in the printing function. Alternatively, SLD could find that 99.995 percent of the overall cost of the combined voice mail-printer system is not the most cost effective way to obtain the eligible voice mail service. In either case, no separate evaluation of whether the calculation is "realistic" would be required.

⁵⁵ *Id.* Manufacturers and service providers may also submit cost allocations.

Report and Order.⁵⁶ If SLD reviewers believe a cost allocation does not comport with its formulation of the Commission's rules, SLD is supposed to discuss its concerns with the applicant in order to reach an acceptable resolution.

Thus, there are several methods by which a cost allocation may be developed, any of which can meet Commission requirements.⁵⁷ E-rate applicants and service providers will most often want to choose the method that is most favorable (*e.g.*, provides a higher percentage allocation to eligible services in comparison to other methods), and that is acceptable so long as the allocation adheres to the criteria contained in the Commission's rule. Stated in another way, a specific method of cost allocation that is imposed by SLD is neither authorized nor required by any Commission rule. E-rate applicants and service providers are entitled to use any method for cost allocation that meets those rules.

Here, after rejecting cost allocation alternatives proposed by the parties, SLD unilaterally determined the COMAD liability of the parties, chiefly IBM, by imposing its own cost allocation methodology on the parties. In doing so, it violated the fundamental tenets of the Commission's rules and longstanding SLD procedure by unilaterally

⁵⁶ *Third Report and Order*, at ¶ 36 (“We specifically amend our rules to make clear how applicants and service providers should allocate costs....”), ¶ 38 (Commission is “providing service providers and applicants a means of allocating costs between eligible and ineligible components”), n. 72 (“[I]n those instances where the Administrator has been presented with mixed eligibility services during the application process, the Administrator has been able to resolve the cost allocation with the school or library and service provider in a reasonable way, and avoid committing universal service support to ineligible services.”). The Commission's stated intent for USAC to *resolve* the issue *in a reasonable way* did not grant authority for USAC to impose a cost allocation method of its own choosing.

⁵⁷ This flexibility is further supported by a May 18, 2005 fax from USAC to EPISD, at 4, (“This cost allocation could be based on pricing information for eligible and ineligible components, or proportion of use between eligible and ineligible features, or another method of your choosing so long as the approach used is based on tangible information that provides a realistic result.”).

imposing its own cost allocation methodology in favor of that proposed by IBM, rather than “resolv[ing] the cost allocation with the school or library and service provider in a reasonable way” through consensus on a mutually agreeable result.⁵⁸

IV. There Is No Legal Basis for the Reduction in the Maintenance Funding Commitment (FRN 648793)

A. The COMAD Violates the Five-Year Administrative Limitations Period with Respect to the Maintenance Funding Request

Contrary to the finding in the SLD Decision, the COMAD in this case was issued after the expiration of the Commission’s five year administrative limitations period with respect to this Funding Request, and therefore should be rescinded as untimely. The Commission established the “**administrative limitations period**” in 2004, in an attempt to provide recipients of E-rate support with a measure of certainty and finality regarding their receipt of funding. In 2004, the Commission established this period at five years, stating:

[W]e will initiate and complete any inquiries to determine whether or not statutory or rule violations exist within a five year period after final delivery of service for a specific funding year Under the policy we adopt today, USAC and the Commission shall carry out any audit or investigation that may lead to discovery of any violation of the statute or a rule ***within five years of the final delivery of service for a specific funding year.***⁵⁹

Importantly, this administrative limitations period coincides with the records retention period applicable to E-rate applicants and service providers.

⁵⁸ *Third Report and Order*, at n. 72.

⁵⁹ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, FCC 04-190, 19 FCC Rcd 15808, 15819 ¶ 32 (2004) (“*E-rate Limitations Order*”) (emphasis added).

The administrative limitations period operates as a temporal bar to Commission and SLD recovery actions initiated after its expiration. Under the Commission's plain language, SLD was required to complete this compliance inquiry within five years of the date of "final delivery of service for a specific funding year," which it failed to do.⁶⁰

Contemporaneous IBM records demonstrate clearly that IBM completed all tasks required under the Maintenance Statement of Work on or before June 30, 2002, not September 30, 2002, as the SLD Decision alleges. *First*, Section 2.7 of the Maintenance Statement of Work establishes a clear end date of June 30, 2002.⁶¹ Throughout the term of the contract, the parties contemplated that end date. Despite SLD's delays in issuing a funding commitment for the work until September 2001, well after work was intended to begin, IBM compressed its execution timetable, deployed appropriate resources, and completed all of the tasks outlined in the Maintenance Statement of Work before the June 30, 2002 deadline.

Second, the final IBM invoice under the Maintenance Statement of Work, as seen in **Exhibit F**, is dated June 12, 2002, and covers the month of June 2002. Similarly, EPISD representative Jack Johnston signed the associated USAC Service Certification on

⁶⁰ IBM nevertheless filed a timely appeal with USAC to the untimely COMAD, and SLD took over four additional years to respond. The issues presented here now arise from transactions the parties concluded a full decade ago. SLD's extraordinary delays at every turn illustrate vividly the reasons for the Commission's administrative limitations period. At this late date, as the Commission has feared would happen, documents are difficult to locate, employees have left the company, and memories have faded. IBM is at a distinct disadvantage being forced to continue this matter well beyond any reasonable time horizon that the Commission could have intended or that the parties could have predicted.

⁶¹ Contract for the Provision of USF Maintenance Services Prepared for El Paso Independent School District (EPISD), January 18, 2001 ("Maintenance Statement of Work"), at 19. The full document is not attached because IBM understands that it is already part of the record on file with SLD.

June 12, 2002, for submission to USAC. USAC records will substantiate that no other invoices for this funding request were submitted after this time. Thus, the invoice record establishes that service was completed in June 2002. SLD had the invoice record, and therefore the timeline for service delivery, before it for review and consideration at all times before it issued the COMAD.

Third, presentations that IBM made to the EPISD Board consistently indicated an actual completion date of June 28, 2002. Specifically, on June 28, 2002, IBM delivered, and EPISD accepted, two letters that together demonstrate EPISD's acceptance of all work under the Maintenance Statement of Work as satisfactory and complete.⁶² The first, from IBM project manager David Tillman to EPISD's Jack Johnston, states in part:

IBM has completed its responsibilities as outlined in the USF Maintenance Services Statement of Work (SOW), Contract #CFT55SH. We prepared and delivered to Fred Alvarez each of the deliverables as outlines in the SOW.

Thus, IBM and EPISD jointly agreed that the Maintenance Statement of Work had been fully executed before June 30, 2002.

The second is a Letter of Authorization, also dated June 28, 2002, for IBM to begin providing technical support services through the established Technical Support Office under the terms of the Funding Year 2005 Maintenance Statement of Work, in advance of any funding commitment from USAC. The letter states in part:

This Letter of Authorization (this "Letter") authorizes International Business Machines Corporation ("IBM"), through it division IBM Global Services, to

⁶² See **Exhibit I**, attached hereto, showing two letters dated June 28, 2002. Although the fully executed versions of these letters cannot be located today, nearly ten years later, IBM is aware of no substantial question that they were executed with the content as presented.

begin providing *E-rate Funding Year 2002 (E-rate 5) USF Technical Support Services* to the El Paso Independent School District (EPISD).⁶³

In stating that continued service was specifically for E-rate FY2002, the letter establishes that E-rate FY2001 services had been completed, and that services provided after June 30, 2002 were in anticipation of a potential FY2002 funding commitment. After this funding commitment failed to materialize, and in accord with the terms of the letter, IBM wound up its maintenance operations, but received no compensation, either from EPISD or from USAC, for the maintenance services it provided after June 30, 2002.

Fourth, the Congressional testimony of Mr. Caine, of which SLD was clearly aware, as it cited it both in the Further Explanation Letter accompanying the COMAD and in the SLD Decision rejecting IBM's appeal, substantiates an end date of June 30, 2002. In his testimony, Mr. Caine indicates that service was provided "until the funding year ended June 30."⁶⁴ As to additional service not a part of the FY2001 IBM EPISD contract, Mr. Caine indicates:

We, the company, stayed with the school district and ran that maintenance and help desk service for 6 months following the end of that year receiving no funds. So we stayed on with the school district from June until the end of the year on our cost because we knew that we had built this; we thought there was good value to the school district; and we did not want to leave the school district just hanging there.⁶⁵

This is indicative of IBM's commitment to strong customer service. While IBM was hopeful that E-rate funding would be obtained for FY2002, IBM took a risk in providing

⁶³ Emphasis in original.

⁶⁴ *IBM E-rate Testimony*, at 261.

⁶⁵ *Id.* at 260-61.

service prior to the receipt of the next-year funds. Those funds were not forthcoming, and IBM absorbed the full cost of providing the additional service to EPISD.

The SLD Decision blithely dismisses the prohibitive effect of the administrative limitations period articulated in the Commission's *E-rate Limitations Order*. Invoking unspecified "USAC records," SLD states that the "last date for service on the cited FRNs is September 30, 2002."⁶⁶ Through this critical – yet utterly unsupported – assertion, SLD provides itself with a providential extension that seemingly transforms its out-of-time COMAD into one issued with days to spare.

SLD's reinterpretation of the *E-rate Limitations Order* cannot stand. SLD appears to have improperly conflated the September 30 deadline that SLD imposes for delivery and installation of non-recurring services⁶⁷ with the actual date of IBM's "final delivery of service for a specific funding year." While the former represents the theoretical last *possible* date on which nonrecurring services could have been delivered and installed, the latter represents the last date on which IBM actually did so. SLD's assertions of timeliness notwithstanding, the *E-rate Limitations Order* sets the administrative limitations deadline based on the actual final date of service delivery and installation, not the theoretical maximum.

That the administrative limitations period runs from the actual date of final delivery of service, rather than the September 30 deadline, is further demonstrated by the

⁶⁶ SLD Decision, at 3.

⁶⁷ See "Schools and Library Applicants Step 11: Service Delivery Deadlines and Extension Requests," available at: <http://www.universalservice.org/sl/applicants/step11/service-deadlines-extension-requests.aspx> ("In general, non-recurring services must be delivered and installed between July 1 of the relevant funding year and September 30, following the June 30 close of that funding year . . .").

Commission's E-rate document retention policy. The *E-rate Limitations Order* explicitly states the Commission's intent that the document retention period and the administrative limitations period would expire concurrently.⁶⁸ Using similar language, therefore, the Commission amended its rules to state that service providers must retain relevant records "for at least 5 years after the last day of the delivery of discounted services."⁶⁹ Thus, choosing its words carefully in order to provide "clear guidance,"⁷⁰ the Commission decided that the document retention period would run from the last day on which services are actually delivered by the service provider to the school or library E-rate applicant, and not the final day of the funding year in which the services were delivered.

The Commission's recent *Lakehills* decision, in which it broadly held that, "USAC's recovery of government funds paid to an applicant or service provider who has no just right to keep the funds is not barred by the passage of time," is not to the contrary.⁷¹ In *Lakehills*, the Commission made this statement in the course of rejecting the claim of the Bankruptcy Trustee for Lakehills Consulting, L.P. that an SLD COMAD was time barred by the one-year statute of limitations in Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), applicable to fines and forfeitures. The

⁶⁸ *E-rate Limitations Order*, at ¶ 32 ("For administrative efficiency, the [administrative limitations] time frame for such inquiry should match the record retention requirements").

⁶⁹ 47 C.F.R. § 54.516(b); *see also* 47 C.F.R. § 54.516(a) ("Schools and libraries shall retain all documents related to the application for, receipt, and delivery of discounted telecommunications and other supported services for at least 5 years after the last day of service delivered in a particular Funding Year."); *E-rate Limitations Order*, at ¶ 47 ("[B]oth applicants and service providers to retain all records related to the application for, receipt and delivery of discounted services for a period of five years after the last day of service delivered for a particular Funding Year.").

⁷⁰ *E-rate Limitations Order*, at ¶ 47.

⁷¹ *Lakehills*, at ¶ 28.

Bankruptcy Trustee did not raise the issue of the potential effect of the administrative limitations period in its Request for Review,⁷² and the Commission, accordingly, did not discuss it. Moreover, IBM received the E-rate funds at issue here pursuant to valid funding commitments issued by SLD. Thus, in no case could it be said that IBM lacked a just right to the funds, at a minimum when those funds were disbursed.

B. The Schools and Libraries Division Gave Thorough and Proper Review to Funding Request in 2001

In the SLD Decision rejecting IBM's appeal of the COMAD, SLD asserts that, "[a]fter funding was issued, it came to USAC's attention that the support documentation did not accurately detail the equipment and services that were actually delivered."⁷³ This echoes SLD's 2004 statement that "the Item 21 attachments generally do not accurately reflect the products and services identified in the Statements of Work."⁷⁴ This contention cannot withstand scrutiny. To the contrary, the four-page Item 21 Attachment related to this funding request was quite extensive and contained the complete task list for the Maintenance Statement of Work. IBM successfully executed these tasks under a compressed time frame given the fact that SLD did not issue a funding commitment until September 2001, well after the start of the funding year, in large part due to its rigorous eligibility review.⁷⁵

⁷² See *Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting L.P.*, CC Docket No. 02-6, Request for Review of a Decision of the Universal Service Administrator/Waiver (filed May 31, 2011), at 17.

⁷³ SLD Decision, at 3.

⁷⁴ See **Exhibit G** (SLD Sept. 16, 2004 Letter), at 1.

⁷⁵ Further, the applicant has final authority and control over the Item 21 attachment and its content. While a service provider may assist with the drafting of an Item 21 attachment, the

No new factual information came to SLD's attention that was not available at the time SLD issued its funding commitment in 2001. As the Item 21 Attachment reveals, the full list of tasks associated with the IBM Scope of Work was submitted to SLD and reviewed before the FCDL was issued. This task list was the subject of careful advance review of complete information by numerous expert members of SLD's staff. At the time of this review, it was their expert judgment that all contemplated activities were consistent with E-rate rules and policy, as they existed at the time. IBM vigorously denies any lack of detail in the Item 21 Attachment, or any substantial inconsistency between the Item 21 Attachment and the work IBM actually completed, because none exists. As such, IBM properly relied upon SLD's funding approval and the Commission's statement that "the only way an applicant can determine whether a particular service or product is eligible under our current rules is to seek funding for that service or product, and then seek review of the Administrator's decision to deny discounts."⁷⁶ SLD approved the FRNs at issue in this matter. IBM and EPISD went to work fulfilling their legal obligations under the FCC Form 471 and contract. Despite SLD's contention to the contrary, no information was hidden from view or described incorrectly.

C. All Tasks in the Maintenance Statement of Work Were Eligible under the 2001 E-rate Framework

SLD's assertions in the COMAD and accompanying Further Explanation Letter of eligibility issues based on new information that came to light after funding was issued

applicant has ultimate decisional authority over what is submitted, and SLD has refused to make those Item 21 attachments available directly to the service provider.

⁷⁶ *Third Report and Order*, at ¶ 40.

are specious. As demonstrated above, SLD had complete information available in the Item 21 Attachment that identified every task contained in the Maintenance Statement of Work. Further, in an Eligibility Analysis attached to SLD's September 16, 2004 letter, SLD conceded that "no significant eligibility issues were apparent under then-current review procedures" in connection with its 2001 review of the maintenance funding request.⁷⁷ Therefore, the COMAD is nothing more than the product of SLD second-guessing based on subsequent Commission orders and rule refinements that cannot be retroactively applied to FY2001 decisions. As the Further Explanation Letter reveals, the information that "came to USAC's attention" was not new factual information that the SLD had somehow overlooked in Funding Year 2001, but rather (1) a misreading of Congressional testimony given by IBM in 2004; and (2) refinements to the Commission's policies on basic maintenance articulated in Orders issued only in the years after the EPISD contract had been fully performed. Neither can support the COMAD as issued.

With respect to the Congressional testimony, the Further Explanation Letter cites unspecified IBM testimony that, as paraphrased by SLD, "services outside of eligible basic maintenance were provided as part of this funding request."⁷⁸ A review of the Congressional testimony offered by Christopher G. Caine, Vice President, Government Programs, IBM, reveals no testimony that IBM received E-rate support for any ineligible

⁷⁷ SLD Sept. 16, 2004 Letter, "Eligibility Analysis," at 1.

⁷⁸ See **Exhibit H** (Further Explanation Letter), at 15. The Further Explanation Letter cites the *IBM E-rate Testimony* at 260-262. As indicated in the text, no such testimony appears on those pages.

service it provided to EPISD.⁷⁹ Based on the discussion in the Further Explanation Letter, it appears that SLD has two chief concerns, namely that costs of “a comprehensive level of support beyond basic maintenance” might be included in the basic maintenance services contract; and that costs of “an extensive facility for maintenance support” purported to have been created by IBM may be ineligible. Neither concern can justify the COMAD as issued.

1. IBM Did Not Provide Support in Excess of Eligible Basic Maintenance

SLD’s contention in the Further Explanation Letter that, in hindsight, the Maintenance Statement of Work contained ineligible services is incorrect. The Further Explanation Letter finds that five tasks were ineligible wholly or in part, based on an assertion that they included components of end user support. The record, however, clearly demonstrates otherwise.

Implementing the Maintenance Statement of Work, IBM clearly delineated maintenance responsibilities, separating eligible network support and maintenance, for which it assumed responsibility under the E-rate basic maintenance contract, and ineligible workstation maintenance and support, for which EPISD personnel retained responsibility. To effectuate these bright-line safeguards, IBM put in place IBM-owned equipment specifically to intercept ineligible requests and redirect them to EPISD support personnel. This is far from new information. SLD explicitly raised this issue during its

⁷⁹ SLD also cites the Caine testimony as support for its argument that there may have been up to \$16 million in tools in the funding request, and that IBM provided service for only 2½ months before June 30, 2002. As discussed herein, neither assertion reflects the testimony actually provided.

2001 review of the funding request, and received the confirmation from EPISD that ineligible support and maintenance was being provided by EPISD, not IBM.⁸⁰

Despite this contemporaneous assurance, and the physical infrastructure put in place to enable adherence, the Further Explanation Letter incorrectly contends that IBM provided ineligible end-user workstation support. In a listing of seventeen tasks to be provided by the support center, provided in the Statement of Work, SLD identified five that it contends are partially or fully ineligible, as follows:

Statement of Work Task	USAC Comment
1. Take incoming calls from EPISD users	Some calls were for ineligible end user support—partially ineligible
3. Serve as initial point of contact for support, maintenance, and problem resolution	Some contacts were for ineligible end user support—partially ineligible
12. Maintain documentation of problems and ‘own’ problem resolution for in-scope activities, defined as: <ul style="list-style-type: none">• Netfinity servers (number to be stipulated)• RS 6000 servers (to be stipulated)• Workstation support related to the network (approximately 10,000 workstations)• Networking hardware and configuration support (Disco networking equipment located in up to 90 buildings)• Dial-up/direct connections to the Internet• Network connectivity between buildings	Workstation support is not eligible—partially ineligible

⁸⁰ See Letter from Jack S. Johnston, Executive Director, Technology and Information Systems, EPISD, to Mathen Varughese, SLD (Sept. 14, 2001), attached as **Exhibit J**, hereto (“IBM performs no work on PC workstations. All out of scope work functions, i.e., PC workstations, are performed by El Paso Independent School District’s employees. IBM does not perform any work on PCs or other end-user equipment.”).

13. Perform appropriate ‘hand-off’ of out-of-scope work functions (i.e. PC workstation warranty work)	No PC workstation work is eligible—not eligible
14. Report out of scope activities to project office for proactive interaction with El Paso ISD resources to minimize future occurrences	Some reporting was for PC workstation work—partially ineligible

SLD states that these findings of ineligibility are “limited to circumstances in which the determination is clear.” However, SLD’s conclusions are based on interpretations at odds with the specific wording and actions that it cites, and run contrary to the explicit assurances SLD received in 2001. IBM here provides a more fulsome description of each of the questioned tasks to demonstrate that only eligible services were provided, as follows:

Take incoming calls from EPISD users. IBM was firm in its understanding and its implementation that end-user workstation support was not eligible and was to be undertaken by EPISD support staff and not IBM. However, in the delivery of eligible network support services, IBM established a reporting system that allowed outages and problems to be received by phone from *any* EPISD user who was aware of a problem. USAC draws an incorrect inference that “taking a call from an EPISD user” reporting a network problem is indicative of ineligible end-user workstation support. Rather, in the interest of prompt resolution of eligible network issues, IBM would accept a call from any EPISD user who was aware of a network problem.

Serve as initial point of contact for support, maintenance, and problem resolution. SLD asserts that some contacts were for ineligible end user support, but this is simply not true. Nothing in the statement or in other information or in the services as actually

provided indicates the ineligible end user support was a part of IBM services as claimed by SLD. Further, to the extent that any end users called with requests for ineligible services, IBM-owned and -operated equipment was in place to route those calls to EPISD personnel for handling.⁸¹

Maintain documentation of problems and 'own' problem resolution for in-scope activities [including] [w]orkstation support related to the network (approximately 10,000 workstations). SLD appears to treat “workstation support related to the network” as synonymous with “ineligible end-user workstation support,” but this is not the case. The IBM support team provided services for workstation network problems up to the cable plugging into the end user computer. The end-user workstation itself was the responsibility for the EPISD support team, not IBM. The term “workstation support related to the network” involved the eligible activities of support for cabling, routers, switches, and hubs that, if inoperable, would cause an end-user workstation to lose network connectivity.

Perform appropriate 'hand-off' of out-of-scope work functions (i.e. PC workstation warranty work). SLD appears to confuse compliance with eligibility requirements with a lack of compliance. If, in the process of diagnosing network problems, an IBM support team member determined that out-of-scope work was required, they would alert EPISD support staff rather than initiating ineligible corrective measures. Under SLD's interpretation, IBM would be unable to provide this communication, resulting in exceptionally poor service and customer relations. IBM had

⁸¹ See **Exhibit J**, hereto.

a partnership with EPISD, as its customer, and maintaining effective communication at all levels was (and remains) essential to good customer service. It would be patently absurd for the Commission to suggest that a service provider should lose E-rate support merely for communicating to its customer that its investigation of eligible network connectivity issues has revealed a workstation problem within the scope of responsibility of the customer's own support staff.

Report out of scope activities to project office for proactive interaction with El Paso ISD resources to minimize future occurrences. In day-to-day operation of complex support systems, coordination is required in order to distinguish between eligible and ineligible services, and to put the right resources in place for the specific task. To the extent that IBM personnel received requests for out-of-scope functions or services, it was in the parties' best interests to evaluate the causes of such situations so that they could be avoided in the future, either through process improvements, additional training, or other means. This was not an ineligible activity; to the contrary, it was intended to improve coordination and ensure that IBM would continually focus on only eligible activities.

SLD's Further Explanation Letter further asserts that a reference in the Statement of Work to "server and network monitoring" points to ineligible activity. This is not so. The various ESLs available in the 2000-2001 time period contain contradictory information, yet the weight of the evidence supports a conclusion that SLD deemed the monitoring activities by IBM to be fully eligible.⁸² On the one hand, the ESL of January

⁸² In the three month time period from November 1, 2000 to January 24, 2001 (the time period when applicants and service providers are preparing RFPs and bid responses for eligible services) the SLD issued five separate versions of the ESL. This is indicative of the

24, 2001 stated that “Network Management Systems” and “Network Management Software” were ineligible.⁸³ On the other hand, the List indicates that eligible routers could provide “network management capabilities” and further indicates that an “SNMP System Management Module” is eligible. (SNMP stands for “Simple Network Management Protocol,” the standard approach for managing and monitoring a TCP/IP network. An eligible SNMP management module would be a fundamental component of a network monitoring and management solution.) Taken as a whole, IBM’s interpretation of this information is that E-rate would not pay for applicant purchase of the hardware or software to provide network management/monitoring capabilities, but did not prohibit this standard method of cost effective support services as part of a maintenance contract.

Further, eligibility of monitoring services is, plainly and simply, a cost effective means of reducing overall maintenance costs and reducing network down time. Thus, these services carry the potential to reduce the overall cost burden of maintenance on the E-rate applicant and Universal Service Fund alike, and also significantly increase network up-time, for the benefit of teachers and students, and in support of educational goals, the chief purpose of the E-rate program. Without proper monitoring, when the network goes down, the technician is left to guess where the fault may lie, and may have to physically examine the network components, piece by piece, in a time-consuming

constantly evolving state of eligibility knowledge—and resulting confusion to applicants and service providers—that existed during this time.

⁸³ The January 24, 2001 ESL does not include an entry for “network monitoring.” However, a “Network Management System” is defined in the ESL as “[a] system of equipment or software used in *monitoring*, controlling and managing a data communications network.” (emphasis added) “Network monitoring” and “network management” are closely related, so the most complete consideration of eligibility is to consider eligibility for both “management” and “monitoring,” as is done here.

process, to identify and resolve the issue. With monitoring in place, the technician can receive a variety of advance warnings of impending issues that not only provide valuable information to shorten the time-to-repair, but may enable the technician to avert the problem altogether.

This eligibility is supported by the example of a “network sniffer,” which is a diagnostic tool that monitors the network and indicates where a fault exists. Without such monitoring, accurate diagnosis of a network fault cannot be reasonably obtained. Thus, the action of “monitoring” is an “essential element” in providing maintenance services, even if an applicant’s purchase of monitoring hardware or software is not. To conclude otherwise would require every E-rate-supported technician to personally stand in front of one potentially faulty component after another, which would be grossly inefficient and significantly contrary to common practice when remote support services (through management and monitoring) can efficiently accomplish the task.

Thus, the use by IBM personnel in providing highly efficient diagnostic and correction services by using the standard tools of the industry should not be equated with the purchase of ineligible components by the applicant and should not be equated with the provision of ineligible services.

2. No Ineligible Costs of Facilities Were Included

With respect to the costs of the “facility for maintenance support,” again Commission precedent and SLD programmatic rules indicate that such costs were considered eligible. Indeed, the Further Explanation Letter cites no Commission rule, order, or other precedent for its conclusion that “the creation of an extensive support

structure for the delivery of [basic maintenance] services is not eligible.”⁸⁴ This “rule,” of course, is utterly unworkable for E-rate program participants. For example, what is creation, as opposed to augmentation, reorganization, or the like? What is the threshold for a support structure to be considered extensive?

In this case, the “facilities” in question are not telecommunications infrastructure or other capital improvements, but merely include items commonly regarded as necessary to support a maintenance services operation, such as office space for maintenance personnel to sit, network diagnostic tools necessary to diagnose and repair network faults, and communications services necessary to support the volume of maintenance requests reasonably anticipated in connection with a network spanning dozens of buildings, and serving some 8000 EPISD employees and 60,000 students.

Service providers, by necessity, must include the price of the tools, facilities, travel, overhead, and all other costs in their pricing to customers. The FCC has recognized this when it stated “[w]e recognize that all service providers include within their prices to customers some amount of the cost of building facilities to provide the service.”⁸⁵ Thus, E-rate will not pay an invoice for a separate screwdriver, but IBM and other E-rate service providers require screwdrivers and other tools, and have substantial additional costs in providing the services that Applicants request. Accordingly, service providers must price their services in a manner that accounts for these costs.

⁸⁴ See **Exhibit H**, Further Explanation Letter, at 15.

⁸⁵ *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, CC Docket No. 96-45, Order, FCC 99-216, 14 FCC Rcd 13734, ¶ 29 (1999).

The COMAD thus appears to stem from SLD's attempt to impose the more restrictive definitions of "basic maintenance" services articulated in the subsequent *Third Report and Order* and *Ysleta* decisions onto the earlier Maintenance Statement of Work concluded between IBM and EPISD for FY2001. In 2001, however, SLD and the parties alike had only the sparse guidance available in the *Universal Service Order* and the evolving ESL. Neither can support SLD's assertion that the scope of maintenance services EPISD provided was ineligible at that time. The January 24, 2001 ESL includes the word "basic" thirteen times, but never in a context that would apply to technical support or maintenance activities. The ESL entries are fully consistent with the services IBM performed. In fact, in a decision issued while SLD's review of the EPISD funding request was underway, the Common Carrier Bureau overturned an SLD decision construing the eligibility of maintenance services narrowly, stating:

SLD should not have designated on-site engineering support as ineligible for discounts SLD's eligibility list clearly states that 'labor charges incurred for the installation and contractual maintenance of eligible Internal Connections . . . are eligible for discount.' . . . Therefore, labor charges incurred for the installation and maintenance of the data services described in Springfield's FCC Form 471 should be eligible for discount. Under these circumstances, we conclude that the record does not support SLD's finding that on-site engineering should be ineligible for discounts."⁸⁶

The Bureau thus specifically endorsed SLD's broad formulation of eligible maintenance services that was in effect in the ESLs of the era. Despite this endorsement, SLD's COMAD and Further Explanation Letter at issue here fail even to mention the

⁸⁶ *Request for Review of the Decision of the Universal Service Administrator by Springfield Public Schools, Springfield, Massachusetts*, CC Docket No. 96-45, Order, DA 01-587, 16 FCC Rcd 5281, ¶ 5 (2001) (alterations of quoted material as in original).

broad formulation of “maintenance” services appearing in those ESLs and endorsed in *Springfield*, instead relying heavily on the subsequent formulations of “basic maintenance” from the prospective *Third Report and Order* and *Ysleta*. As is apparent, however, as in effect in FY2001, Commission orders and programmatic rules alike support the eligibility of the services in the Maintenance Statement of Work.

First, the Commission itself offered only inconsistent and passing references to these services in the *Universal Service Order* that established their eligibility. The Commission had not yet offered its more detailed views on the scope of eligible “basic maintenance” services that were contained in the *Third Report and Order*. Rather, in 1997, the Commission was focused on defining “internal connections,” devoting only a few paragraphs to the subject, and found in the first that E-rate support would be available for “installation and maintenance” of internal connections that met the definition.⁸⁷ Not until the following paragraph, as the Commission cited examples of eligible equipment, did it articulate the now-familiar formulation of “installation and basic maintenance,” although that paragraph also reiterated the “installation and maintenance” phrasing and offered an additional reference to “basic installation and maintenance.”⁸⁸ Suggesting a far more expansive scope than the *Third Report and Order* and *Ysleta* decision ultimately accepted in 2003, the Commission in 1997 found that it should not place any “specific restrictions on the size, *i.e.*, type, of the internal connections network covered.”⁸⁹ In the instant case, EPISD requested internal

⁸⁷ *Universal Service Order*, at ¶ 459.

⁸⁸ *Id.*, at ¶ 460.

⁸⁹ *Universal Service Order*, ¶ 460.

connections for dozens of sites that connected tens of thousands of students and faculty. Given the size, complexity, and breadth of the network, it was completely reasonable for EPISD to seek these services and for IBM to provide these services for basic maintenance in FY2001.

It was for that reason that the Commission, in the *Third Report and Order*, acknowledged that “our rules do not expressly specify the types of maintenance costs that are eligible for support” and expressly stated that the additional clarifications and restrictions adopted therein were “prospective.”⁹⁰ Despite this guidance, SLD’s analysis of the Maintenance Statement of Work and decision to seek a COMAD reflect clear reliance on the post *Third Report and Order* analytical framework. For example, SLD states that “neither IBM nor El Paso ISD have provided documentation – such as records of actual services provided – to support their arguments that only eligible services were provided.”⁹¹ While SLD seeks to measure specific services against the strictures of *Ysleta* and the *Third Report and Order* – and, in seeking records of actual services provided, appears to have its eye on the Commission’s newly-minted *Sixth Report and Order* framework⁹² – the Maintenance Statement of Work reflects a fundamentally different conceptual structure for delivering these services. It was not a monthly maintenance contract, such as SLD suggests, but rather a task-based Statement of Work

⁹⁰ *Third Report and Order*, at ¶ 22.

⁹¹ SLD Decision, at 4.

⁹² *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Sixth Report and Order, FCC 10-175, 25 FCC Rcd 18762 ¶ 107 (2010) (“Reimbursements will be paid on the actual work performed and hours used only”) (*Sixth Report and Order*).

as set forth in the Item 21 Attachment. IBM completed each of the tasks prescribed and was paid accordingly.

IBM believes that the Commission meant what it said when it made the *Third Report and Order* guidance prospective only. Prior to that date, less detailed standards meant that an actual USAC funding decision was, in the words of the Commission, the only conclusive “way an applicant can determine whether a particular service or product is eligible under our current rules.”⁹³ Indeed, it was this very lack of predictability that led the Commission to adopt prospective clarifications in the first place.

In any event, it is far from clear that the Maintenance Statement of Work would be ineligible under the *Third Report and Order* and *Ysleta*. The *Third Report and Order* did not specify that all “help desks” are *per se* ineligible. Rather, it only held that the help desk function would be ineligible to the extent that it provides “any ineligible features or functions.”⁹⁴ In the roughly contemporaneous *Ysleta* decision, the Commission further explained its concern that a help desk, in accepting calls from end users, could receive requests for installation, maintenance and changes to various services and equipment, some of which might be ineligible, particularly including end user workstations and software.⁹⁵ However, no such ineligible end user support took place under the EPISD maintenance contract.⁹⁶

⁹³ *Third Report and Order*, at ¶ 40.

⁹⁴ *Id.*, at ¶ 24.

⁹⁵ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, TX, et al.*, Order, 18 FCC Rcd 26406 (2003), at ¶¶ 62-64 (“*Ysleta*”).

⁹⁶ See **Exhibit J**, attached hereto.

As discussed herein, in the case of EPISD, IBM implemented rigorous measures to ensure that its Technical Support Office addressed only calls relating to eligible internal connections equipment and services. IBM specifically designed the maintenance for EPISD so that calls for support for ineligible hardware and software would not be routed to or logged by the IBM support personnel under this FRN. Therefore, the maintenance services provided under this FRN as part of the technical support office was properly approved as eligible.

Second, the USAC ESLs of the era addressed maintenance services, not as their own category, but as a component of internal connections. The ESL at this time was created and published by SLD. E-rate applicants and service providers rightly relied on the accuracy of the List in determining what products and services were eligible. Those lists, cited nowhere by SLD in the COMAD, Further Explanation Letter, or SLD Decision, consistently refer to “maintenance” services, without the “basic” modifier. These lists, in fact, accurately reflect the views of SLD and E-rate program applicants and service providers prevailing at the time, and are consistent with SLD’s initial decision to grant a funding commitment for this request.

3. Any Cost Effectiveness Concerns are Specious

Certain language in the Further Explanation Letter suggests that SLD’s underlying concerns relate to cost effectiveness, not necessarily eligibility, of the services provided under the Maintenance Statement of Work. These include references to a “cost per site in excess of half a million dollars,” an assertion that services were provided for

less than a full year and should be prorated accordingly,⁹⁷ and a reference to some \$16 million in “tools.”⁹⁸ EPISD conducted a competitive bidding process, which was designed to ensure reasonable market pricing. SLD issued its funding commitment with full knowledge as to the price and supporting documentation. If the SLD had any questions about the price or any other issue, it was incumbent upon the SLD to raise those questions during its initial pre-commitment review prior to the issuance of a positive FCDL. In any event, for the following reasons, SLD’s concerns are unwarranted, even today.

First, in the COMAD, SLD incorrectly asserts that IBM provided maintenance support services for 5½ months, until the last day to receive non-recurring services on September 30. As demonstrated above, the actual last day of service was June 30, not September 30. USAC compounds the error, however, by incorrectly concluding that no

⁹⁷ In fact, contrary to SLD’s contention that services began in April 2002, services actually commenced shortly after SLD issued the FCDL, in November 2001. At times, in its correspondence with SLD prior to the issuance of the COMAD, IBM referred to September 30, 2002 as, for example, the “last day to receive service for this FRN,” *see* Letter from John A. (Tony) Wening and Robert H. Richter, IBM, to Mel Blackwell, SLD (Aug. 17, 2006), at 2 (IBM August 17, 2006 Letter). SLD appears to have misunderstood these references to mean the actual last day on which IBM provided service, instead of the intended reference to the last possible day on which IBM could have provided service under this FRN.

⁹⁸ IBM has previously refuted SLD’s misconception on this point, *see* IBM August 17, 2006 Letter, at 2 n.2 (“[n]o foundation has been established for relating the figure cited in the Hearing Record to IBM’s actual cost of creating the on-site maintenance service at EPISD’s location. The information apparently was provided to the SLD by EPISD in a document whose purpose was to emphasize the tremendous value EPISD realized from the maintenance FRN. The document does not say that the figure was provided by IBM, or indeed that EPISD had any access to IBM internal cost data. The statement is either speculation or inadmissible hearsay. Furthermore, the statement actually says that ‘IBM will have provided the district with 43,000 hours of technical professional services, installed \$16,000,000.00 of tools’ It is unclear from the context whether the referenced technical professional services and tools related solely to IBM’s creation of the maintenance services or also related to other IBM tasks and/or FRNs.” (*citing IBM E-rate Testimony*, at 564)).

support services were provided prior to the formal launch of the Technical Support Office.

Eligible services were involved with the implementation of the Technical Support Office, otherwise known as the “help desk.” Prior to initiation of the Technical Support Office, and as indicated in the Maintenance Statement of Work, IBM worked alongside EPISD support personnel in providing eligible maintenance services. USAC leaps to a conclusion that IBM’s direct services only began when the Technical Support Office was completed, but this simply was not the case. Furthermore, SLD’s contention that the assembly of the support infrastructure is ineligible is without foundation in Commission rules and policy.

As Mr. Caine’s testimony indicates, although IBM would have preferred to have the full support capability of the Technical Support Office available at an earlier date, it was far more important for the parties to develop and implement a sound work plan that would fully provide the promised benefits, rather than fall short. When SLD issued the FCDL in September 2001 – in the midst of the confusion and disruption created by the attacks of September 11, 2001 – IBM immediately began planning for a phased rollout. IBM’s project plan was methodical even under the significant time constraints, and resulted in an effective implementation. Mr. Caine’s additional testimony reflects this:

[W]ithin two and a half months of beginning the operation, IBM helped reduce the outstanding trouble tickets that the school district had from the old El Paso help desk arrangement . . . from 600 down to 173. We thought that was good value.⁹⁹

⁹⁹ *IBM E-rate Testimony*, at 260.

Thus, it is clear that IBM support personnel were providing substantial maintenance support services long before the Technical Support Office came into formal existence, a fact that SLD's COMAD overlooks. Unquestionably, maintenance and support services began soon after the FCDL was issued, and IBM submitted invoices, paid by EPISD and SLD, for work from November 2001 forward.

Second, SLD's concern with the time period during which services were provided reflects a fundamental misunderstanding of the Maintenance Statement of Work, overlaying contemporary assumptions regarding basic maintenance services onto a contract conceived, executed, and performed in a much different era. In later years, maintenance services have generally been provided through contracts with flat-rated monthly recurring charges. The 2001 Maintenance Statement of Work at issue here is fundamentally different. It was a task-based statement of work that identified a series of specific maintenance-related tasks, for which IBM would be compensated based on completion. In order to complete these tasks in the foreshortened time remaining in the funding year, IBM allocated appropriate resources to those tasks in order to compress its work schedule and finish on time. In short, IBM performed all tasks listed in the Maintenance Statement of Work, incurred the full costs of doing so, and must be paid for the work it performed. The fact that it did not begin work until after the FCDL was issued is irrelevant to the question of whether the services were delivered. These services were not only break-fix and network maintenance services; additionally the contract successfully obtained the end result of vastly improved support infrastructure, including systematic methods and documentation that would serve for the long term. The full scope of services was outlined in the Item 21 Attachment and the Statement of Work.

These services were evaluated by SLD and rightly determined to be eligible, and IBM delivered those services.

D. The Schools and Libraries Division Erred in Substituting its Cost Allocation for that Proposed by IBM

For the reasons stated above, IBM believes that no cost allocation is necessary or appropriate with respect to this funding request, and that the COMAD is fundamentally in error. Moreover, SLD is attempting to use the Commission's cost allocation process in a different way than that established by the Commission. The Commission's rules clearly establish cost allocation as a means to separate eligible from ineligible services. SLD used the cost allocation process for a purpose different from its intended function to separate eligible from ineligible services. In this case, SLD appears to use cost allocation to support denial of funding for services it believes were not provided.

As demonstrated above, SLD's cost allocation excludes numerous tasks that were, in fact, eligible for funding. Indeed, the Further Explanation Letter states that:

The date of USAC's Funding Commitment Decision Letter was September 28, 2001, and so it is reasonable to expect that the funding commitment should be used for maintenance services over 12 months. If service was only provided for a lesser time period, then the full cost of the FRN should not have been disbursed.

With a correct understanding of the Maintenance Statement of Work, as discussed above, neither of these statements appears reasonable.

Even beyond that failing, USAC fails to articulate why the cost allocation it chose is appropriate under the Commission's rules. The cost allocation SLD imposed weights each purportedly ineligible task evenly, and weights the partially ineligible tasks at 50 percent eligible. While the guidance on SLD's web site states that equal weighting is a permissible choice, it is clearly not the only one available, and is unlikely to be the one

that results in the greatest permissible allocation to eligible services, consistent with the Commission's flexible approach. Thus, SLD's unilateral action vividly illustrates the wisdom of the Commission's decision to give the applicant and service provider the lead in selecting from among permissible cost allocation alternatives.

E. SLD Fails to Explain Its Decision to Place Liability Solely with IBM

In the COMAD, SLD stated that, "USAC will seek recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter."¹⁰⁰ Despite this assertion, the Further Explanation Letter is utterly silent on the matter of USAC's reasoning in assessing the COMAD solely against IBM in this case.

In the *Fourth Report and Order*, the Commission directed USAC to "make the determination, in the first instance, to whom recovery should be directed in individual cases."¹⁰¹ The Commission has directed USAC, in making this determination, to consider factors including which party was in better position to prevent the statutory or rule violation, and which party committed the act or omission that forms the basis for the statutory or rule violation.¹⁰² Given that the Maintenance Statement of Work is a contract agreed to and performed by both parties, it is far from self-evident that IBM should be solely liable for any recovery at this late date. With no analysis and discussion of the matter in the SLD Decision or the Further Explanation Letter, IBM is left only to guess at the extent, if any, of SLD's consideration of this issue. This expressly contradicts the Commission's directive to USAC.

¹⁰⁰ COMAD at 7.

¹⁰¹ *Fourth Report and Order*, at ¶ 15.

¹⁰² *Id.*

SLD fails properly to discharge this responsibility. Rather, SLD provides neither a material discussion of its reasons for assessing liability on one party or the other, as is the case here, nor a general statement that the parties should be jointly liable, such as it offered in connection with its COMAD to recover funding committed to the file servers funding request, discussed below.

V. There is No Legal Basis for the Reduction in the Video Funding Commitment (FRN 648729)

SLD, in issuing the original COMAD, and in compounding that error in the SLD Decision, has demonstrated a fundamental misunderstanding of its own 2001 funding commitment for EPISD video services (Request No. 648729). SLD reviewed the eligibility of this funding request, not once, but twice during Funding Year 2001. SLD issued its original funding commitment following the review of the initial 2001 Form 471 and Item 21 Attachment. Subsequently, EPISD filed a Service Substitution Request dated February 26, 2002, triggering an additional review.

For the reasons discussed below, the Commission should reverse the SLD Decision and order SLD to discontinue collection efforts against IBM.

A. There Was No Reduction in the Number of Sites because the Original Funding Commitment Covered 52 Sites Only

SLD's chief objection that has led it to issue a COMAD and seek recovery of a portion of its original funding commitment for video services appears to stem from its mistaken conclusion that the original funding commitment encompassed 90 sites, while IBM actually installed these products and services at only 53 locations.¹⁰³

¹⁰³ SLD Decision, at 6 ("USAC does not contest whether the services were installed at eligible entities. However, the original FRN pricing was based on 90 locations in the Item 21 but the

This conclusion is directly at odds with the actual 2001 Form 471 and Item 21 Attachment filed by EPISD. The EPISD 2001 Form 471 requested funding for 52 locations at which eligible services would be delivered.¹⁰⁴ The Item 21 Attachment made no adjustment to that figure.

The Video Statement of Work, however, specified that video services would be installed at “up to ninety” sites for a “maximum allowable charge” of \$4,374,054.00.¹⁰⁵ Nevertheless, when the 2001 Form 471 was filed, the parties had agreed on a core group of 52 of the most needy eligible schools at which to deploy these services, and the pricing reflected that lower number of locations. A working document that related to the 90 locations originally being considered indicates a much higher price of \$8,963,489.00.¹⁰⁶ The lower contracted price reflected in the final Video Statement of Work correctly included costs associated with deployment limited to the 52 sites, although the Statement of Work was, apparently inadvertently, not edited to change the phrasing about “up to 90” locations. The equipment costs ultimately came in lower than the amount originally requested; however no decrease in labor costs was experienced, nor should such a reduction be arbitrarily imposed by SLD.¹⁰⁷

installation was only for 53 locations.”). The 53 locations included the 52 eligible schools and the EPISD Central Office.

¹⁰⁴ 2001 Form 471 (No. 256606), Block 4 (listing eligible schools).

¹⁰⁵ IBM Statement of Work for Video Solution and Installation Services Prepared for El Paso Independent School District (executed Jan. 18, 2001) (“Video Statement of Work”), at 11, 16.

¹⁰⁶ See Draft Attachment to FCC Form 471 Application, “Video Group Equipment, Attachment #V,” attached as **Exhibit K**, hereto.

¹⁰⁷ In addition, SLD may have been confused by certain language in IBM correspondence preceding the COMAD, in which IBM adopted SLD’s language describing the issue as a “reduction” in the number of sites. This language, however improvident, cannot override the clearly stated scope of the 2001 Form 471.

In a February 26, 2002 Service Substitution Request, EPISD requested approval to substitute different video equipment for the components originally specified in the Item 21 Attachment. At that time, SLD undertook an additional review to ensure that the specification was appropriate and consistent with program rules.¹⁰⁸ The service substitution was approved and IBM installed and configured the approved components.

B. IBM Was Paid Only for Actual Work Performed

In an attempt to reach resolution of this issue with SLD, and as noted in the SLD Decision, IBM has previously agreed to reduce its equipment charges in connection with this Funding Request by \$641,762.00, even though it believed no reduction was warranted. This voluntary concession should in no way be interpreted to suggest that IBM agrees that its labor charges should be similarly prorated. As described above, the Video Statement of Work was priced contemplating deployment at the sites identified in the 2001 Form 471, and IBM proceeded accordingly.

Because the labor estimate involved never contemplated deployment to all 90 sites, there are no services contemplated under the Video Statement of Work that IBM failed to deliver. Like the Maintenance Statement of Work, the Video Statement of Work provided an estimate of the costs of deploying video services as described therein to the sites specified in the 2001 Form 471. IBM made charges for the deployed equipment and

¹⁰⁸ The SLD website indicates that “individual functions can increase or decrease” in connection with service substitutions. Thus, even if SLD were correct in its speculation that the original funding request was for 90 sites, the approved service substitution would allow IBM to provide fewer equipment components but greater configuration assistance as a result of the revised scope of the project. See “Frequently Asked Questions About Service Substitutions” at <http://www.usac.org/sl/about/changes-corrections/service-substitutions/frequently-asked-questions.aspx>.

labor activities against this contractual amount. As a result, no proration is necessary or appropriate.¹⁰⁹

Additionally, as seen by the approved service substitution, an improved configuration was developed. This change added to the complexity of the project, as it provided an improved implementation of two-way interactive conferencing. Despite this additional work, IBM delivered a highly successful video solution at a final cost well under the amount of the approved funding request.

C. The Schools and Libraries Division Erred in Substituting Its Own Cost Allocation for that Proposed by IBM

As discussed above, IBM submits that, based on the fact that the original funding commitment was for 52 sites, not 90, there is no justification for SLD's requested cost allocation to prorate the labor charges in the Video Statement of Work. All services contemplated in the Video Statement of Work were delivered to EPISD, provided good value to the customer, and were delivered at a price below the approved funding request, despite a change in equipment and related complexity of installation.

Further, the cost allocation process is inapplicable here in any event. SLD has conceded that in the Further Explanation Letter that it "has reviewed IBM's responses and has determined that . . . no ineligible services were actually provided."¹¹⁰ The

¹⁰⁹ The SLD Decision, at 6, also observes that, "[t]he risk of IBM absorbing any cost overruns would constitute in a violation of the free services advisory. *[sic]* The provision of free services must be accounted for in the competitive bidding process." Not only is this reference irrelevant, as there are no cost overruns at issue in this matter, but it represents a clear misreading of the Free Services Advisory. Even had there been cost overruns installing previously-contracted eligible services at eligible locations, such circumstances would in no way implicate the Free Services Advisory.

¹¹⁰ Further Explanation Letter, at 9; *see also* SLD Decision, at 6.

purpose of cost allocation is to separate eligible and ineligible portions of a funding request. In this case, SLD is attempting to use cost allocation rules to support an entirely different argument, namely that the project as implemented could not be cost effective because scope significantly decreased. The implementation was highly cost effective¹¹¹ but, even if it were not, the Commission's rules for cost effectiveness were not in place for FY2001.¹¹² They emerged only in and subsequent to *Ysleta*.

Second, this effort merely relocates the issue already discussed, namely that, contrary to SLD's assertions, the original funding commitment only covered 52 sites, not 90. Further, even if SLD could somehow support an argument that the original Item 21 Attachment covered 90 sites, the project was modified through a valid service substitution process on February 26, 2002. This Service Substitution, modifying the scope of the project to provide an improved implementation, was approved by SLD.

Despite this information, if the Commission disagrees, IBM nevertheless believes that the cost allocation imposed by USAC must be rejected in favor of a cost allocation process consistent with FCC rules. Not only did SLD violate the Commission's directive that permits the applicant and service provider flexibility in selecting a cost allocation

¹¹¹ Letter from Terri Jordan, Executive Director, Business Services, Technology and Information Systems, EPISD to Philip Gieseler, SLD (Aug. 19, 2005), at 5 ("The District has also been pleased with the result from its acquisition of video carts with Year 4 funding. Indeed, since then, the District has purchased many more video carts, using its own resources, and is in the process of acquiring more.").

¹¹² In the *Third Report and Order*, at ¶ 65, the Commission indicated that "[o]ur rules do not expressly require, however, that the applicant consider whether a particular package of services are the most cost effective means of meeting its technology needs. Nor do our rules expressly establish a bright line test for what is a 'cost effective' service." In *Ysleta*, at ¶ 54, the Commission's formulated the issue somewhat differently, stating that "a proposal to sell routers at prices two or three times greater than the prices available from commercial vendors would not be cost effective, absent extenuating circumstances." Even in the most jaundiced misreading of the Video Statement of Work the funding request would meet this standard.

process that produces the most favorable result within the parameters established by the Commission, but the cost allocation imposed by SLD is facially wrong.

Specifically, in the Further Explanation Letter, SLD rejected IBM's contention that certain tasks would not vary in scope, regardless of the number of sites involved, as follows:

FRN Task	USAC Response
1. "All units shipped at the same time from SUBCONTRACTOR will also be tested as a system, if proper documentation has been provided to SUBCONTRACTOR from the customer." (10%)	Testing of a smaller number of components is smaller in scope than testing of a larger number of components.
2. "Test the product with its connected peripherals as part of the system (System Level Acceptance Test and Product Level Field Acceptance Test) as installations occur. If the IBM customer provided network, IBM customer provided peripherals or IBM customer provided wiring prevents the system from passing, the testing will be completed without the IBM customer provided components." (20%)	Testing of a smaller number of components is smaller in scope than testing of a larger number of components.
4. "Provide system level testing (System Level Acceptance Test) information to the IBM Project Manager." (5%)	Development of information regarding configurations at 53 sites is smaller in scope than such services involved with 90 sites.

SLD's commentary reflects a fundamental misreading of the Video Statement of Work. Each of these tasks involves testing the installed video products *as a system*. Such testing does not vary materially in scope whether the system covers 53 sites or 90; the system must function as a whole. Other specific tasks in the Video Statement of Work cover the individual testing of single components. Further, in each case, SLD repeats its erroneous conclusion that the funding request covered 90 sites.

Accordingly, SLD should be directed to consider a cost allocation submitted by IBM, and evaluate this on its own merits using established FCC criteria, without predisposition toward a particular result or level of reimbursement.¹¹³

D. SLD Fails to Explain Its Decision to Place Liability Solely with IBM

As with the COMAD for the Maintenance funding request, and despite its statement in the Video COMAD that, “USAC will see *[sic]* recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter,” SLD fails to offer any explicit discussion of its allocation of liability. For the reasons discussed above, the Commission should direct SLD to make explicit its reasons for allocating liability in this and all COMADs among the parties involved, in accordance with its previous orders on the subject. With no discussion of the matter in the SLD Decision or the Further Explanation Letter, IBM is left only to guess at the extent, if any, of SLD’s consideration of this issue. IBM cannot refute arguments that SLD has not presented.

VI. There Is No Legal Basis for the Reduction in the Web and File Server Funding Commitment (FRN 648960)

SLD seeks recovery of 25 percent of its original funding commitment for Web and File Servers based on its finding that they were used in part for an ineligible activity, end user file storage. As discussed below, this finding is in error and, in any event, does not support recovery from IBM. IBM has recently learned that EPISD in fact paid 50

¹¹³ If the Commission determines that IBM may provide its own cost allocation, IBM would consider the appropriate cost allocation method anew, and would not necessarily rely on that previously submitted.

percent of the COMAD amount in 2007.¹¹⁴ Because the COMAD in this case cannot stand, IBM respectfully suggests that the Commission direct USAC to return EPISD's payment.

A. SLD's Findings Provide an Insufficient Basis for the COMAD

The SLD Decision addresses two issues with respect to IBM's appeal of the COMAD issued in connection with the Web and File Server Funding Commitment, namely cost allocation and COMAD liability. SLD specifically contends (i) that EPISD's proposed cost allocation failed to comport with SLD's standard of being based on tangible information that provides a realistic result; and (ii) that SLD correctly issued the COMAD to EPISD and IBM jointly.

In addition to being incorrect, these findings overlook far more fundamental issues. The underlying rationale on which SLD based its decision to pursue a COMAD against this funding commitment fails to withstand scrutiny. In this case, the COMAD appears to be based virtually entirely on EPISD's statement in an August 19, 2006 letter, that "[t]he Novell authentication Servers are, however, also configured for supplementary student file storage, which is ineligible for discount per the applicable Eligible Services List."¹¹⁵ Making a meal of this statement, the Further Explanation Letter, at 13, concludes that cost allocation is necessary because, "the storage of non-e-mail end user files was not eligible under the Funding Year 2001 Eligible Services List."

¹¹⁴ *Request for Waiver in connection with the Universal Service Administrator's Demand for Payment by El Paso Independent School District, El Paso, Texas*, CC Docket No. 02-6, Request for Waiver, File No. SLD-256606 (filed Feb. 15, 2012).

¹¹⁵ See Letter from Louis Mona, Interim Executive Director, Business Services, Technology and Information Systems, EPISD to Mel Blackwell, Vice President, SLD (Aug. 19, 2006), at 3 (attached as **Exhibit L**, hereto).

Even if true, EPISD's statement, without more, is insufficient to sustain the COMAD. EPISD's letter, written more than four years after the close of Funding Year 2001, is utterly silent as to how the servers were configured at the time of installation, when they were first used for end user file storage, and who configured or reconfigured them to support such usage. The answers to each of these questions is vital to SLD's decision whether to issue a COMAD and, if so, against whom. Yet, SLD has yet to ask these questions, let alone adduce any answers.

In 2001, the Commission's rule barring the transfer of eligible equipment and services for a period of three years after purchase was not yet in effect.¹¹⁶ In lieu of such a rule, USAC pursued an informal policy advising against such transfers (to a different location or for a different use) for one year. Under either a one-year or a three-year rule, EPISD's statement in August 2006 – some four years later – describing the then-current use of the servers provides an insufficient basis for the COMAD.

B. IBM Bore No Responsibility for the Functional Configuration of the Servers following Installation

The Web and File Server Statement of Work contains a section entitled "IBM Responsibilities," which sets forth a full and detailed description of the tasks to be undertaken by IBM.¹¹⁷ In addition to project coordination and site survey tasks, the Web

¹¹⁶ 47 C.F.R. § 54.513(d) ("Eligible services and equipment components of eligible services purchased at a discount under this subpart shall not be transferred, with or without consideration of money or any other thing of value, for a period of three years after purchase, except that eligible services and equipment components of eligible services may be transferred to another eligible school or library in the event that the particular location where the service originally was received is permanently or temporarily closed.").

¹¹⁷ IBM Statement of Work for El Paso Independent School District for Web and File Server Project (Jan. 18, 2001), at 5-6 ("Web and File Server Statement of Work").

and File Server Statement of Work identifies the following IBM tasks to be completed with respect to the file servers:

1. Provide Hardware and Operational Software as listed in Appendix C.
2. Deliver each Server to its designated location.
3. Install IBM server hardware.
4. Perform power on system test.
5. Attach server to the existing Ethernet network and configure network.
6. Install Novell 5.0 Operational Software server and implement NDS.¹¹⁸

The Web and File Server Statement of Work contains a similar list with respect to the installation of Web Servers:

1. Provide Hardware and Operational Software as listed in Appendix C.
2. Deliver each Server to its designated location.
3. Install IBM server hardware.
4. Perform power on system test.
5. Attach server to the existing Ethernet network and configure network.
6. Install Windows NT Server.
7. Implement proxy, DHCP, and server caching for Internet communications.¹¹⁹

Thus, when IBM completed its work under the Web and File Server Statement of Work,

¹¹⁸ *Id.* (NDS stands for “Novell Directory Services,” a part of the network operating system).

¹¹⁹ *Id.*, at 6. With respect to proxy services and caching, which SLD has previously pointed out are ineligible services, it has previously been established in this matter that Windows NT Server does not include proxy services or caching, nor was any other software installed that would provide these features. Therefore, since these services were not installed on the servers, no cost allocation is required to address this point. *See* Letter from John A. (Tony) Wening and Robert H. Richter, IBM, to George McDonald, Vice President, SLD (Feb. 25, 2005) at 2.

the servers would have been connected to the network and operational for eligible services. None of these tasks include configuration of the server for end user file storage. Moreover, IBM does not perform such work.

IBM has no record of any of its employees undertaking additional work to configure the servers for end user file storage, and no knowledge of how or whether that change may have taken place. IBM internal controls require a Project Change Request (“PCR”) for any modifications in project tasks, and no PCR was issued for such additional responsibilities beyond that specified in the Statement of Work.

Accordingly, the conclusory assertion in the Further Explanation Letter, at 14, that, “El Paso ISD and IBM . . . each share responsibility for the ineligible use. Specifically, El Paso ISD used a portion of the servers for an ineligible use, and IBM was responsible for configuring the servers to allow for the ineligible use” defies explanation. As indicated above, no provision of the Web and File Server Statement of Work assigns that responsibility to IBM, nor did IBM personnel perform such configuration. In making this finding, SLD cites no legal authority, no statement of fact in the record it compiled between 2001 and 2007, and no logical inference that would support imposition of liability on IBM for any reason.

C. The Schools and Libraries Division Erred in Substituting Its Own Cost Allocation for that Proposed by IBM

In this case, it appears abundantly clear that no cost allocation is necessary because SLD has failed to establish essential legal and factual elements of the COMAD’s foundation. Nevertheless, should the Commission conclude otherwise, it is plain that the cost allocation imposed by USAC cannot stand.

First, for the reasons discussed above, Commission rules prohibit SLD from unilaterally imposing a cost allocation method on program applicants and service providers. Thus, SLD was not permitted to unilaterally reject EPISD's proposed cost allocation, and should have continued to engage with EPISD in an attempt to reach a consensus resolution. In this case, SLD's conduct was even more egregious, however. While imposing joint liability under this COMAD on IBM, SLD gave IBM no opportunity whatsoever to propose its own cost allocation methodology or comment on those methodologies advanced by EPISD or SLD. Wherever the outer limits of the Commission's flexible approach to cost allocation methods may lie, they surely require SLD to offer some opportunity for input to a party on which it intends to impose COMAD liability.

Second, the cost allocation methodology proposed by EPISD was, in fact, entirely consistent with Section 54.504(e) of the Commission's rules, which requires that the cost allocation must "have a tangible basis, and the price for the eligible portion must be the most cost-effective means of receiving the eligible service."¹²⁰ EPISD made the entirely permissible assumption that the storage capacity of the allegedly partially-eligible servers was split evenly between eligible and ineligible uses. EPISD then proposed a cost allocation based on a comparison of the costs, in January 2002, of servers with two hard drives, as it purchased, and servers that had only one hard drive offering half the storage capacity. SLD rejected this methodology in favor of its own, which allocated the entire

¹²⁰ 47 C.F.R. § 54.504(e).

cost of the two-drive servers EPISD purchased equally between eligible and ineligible services, issuing a COMAD for 50 percent of the cost of the affected servers.

On appeal, the SLD Decision waves away IBM's objections with the conclusory assertion that, "the proposed cost allocation method by El Paso ISD did not achieve the aforementioned [tangible information that provides a realistic result] standard."¹²¹

Reaching back to the Further Explanation Letter, SLD identified the following issues:

- "The file servers consist of many components beyond the hard drives, such as memory modules, central processing unit, case, and cooling fans. All components of the file servers are being used in part for ineligible capability not just the hard drives.
- "Subtraction of hardware cost only is not appropriate because a substantial amount of the FRN cost was for installation and configuration of the file servers.
- "As an ancillary point, El Paso ISD claims that the hard drive costs are based on January 2002 information, yet it is not clear that the supporting information submitted represents costs during that time period. Actual costs at time of procurement would be higher than current costs."¹²²

None of these objections supports rejection of the EPISD methodology.

First, IBM agrees that file servers have many components beyond hard drives. That mere fact, however, does not compel a cost allocation that divides the cost of the server equally between eligible and ineligible uses. In the *Third Report and Order*, the Commission explicitly allowed that the "the cost allocation may be based on the added cost or added market value of the ineligible functions."¹²³ This is precisely the calculation EPISD proposed.

Second, while a portion of the funding request unquestionably covered installation

¹²¹ SLD Decision at 5.

¹²² Further Explanation Letter, at 13-14.

¹²³ *Third Report and Order*, at ¶ 32 n. 61.

and configuration costs, this fact provides no basis for SLD's rejection of the EPISD cost allocation methodology. Because the Web and File Server Statement of Work did not cover configuration of the servers for use in storing end user files, installation and configuration costs were unaffected by the ultimate use of the server for ineligible file storage. As such, EPISD's cost allocation comports with the "added cost . . . of the ineligible functions" standard endorsed by the Commission.

Third, SLD's questioning of whether the relative costs utilized by EPISD were actually in effect in January 2002 is beside the point. While raising the issue, SLD identifies no specific basis for its concern, and there is no evidence to the contrary in the record. Without such evidence, SLD should have either accepted EPISD's representation or asked for further substantiation of the claim. To the extent that SLD's rejection of the EPISD cost allocation proposal turned on that fact, the Commission's flexible approach made it incumbent on SLD to clarify whatever aspect it believed was "not clear." Further, regardless of the precise time frame from which the data were drawn, the ratio between the cost of a one-drive server and a two-drive server would likely remain adequately stable over a substantial period of time to permit a reasonable allocation of the EPISD's actual purchase costs. It should be fully sufficient for the applicant to make a good faith and reasonably accurate estimate of those costs when they are not otherwise specifically known.

EPISD could have chosen any number of cost allocation methods, but chose one that was explicitly endorsed by the Commission. EPISD was not obligated to choose a less advantageous method, and it is improper for SLD to impose one by force. EPISD

simply chose from among several acceptable methods. For that reason the EPISD cost allocation must be deemed acceptable.

VII. The COMAD for Web Access Is Unfounded (FRN 648758)

A. SLD Provides No Explanation Whatsoever for its Decision to Issue the COMAD for Web Access

The Commission requires SLD, when issuing a COMAD, to articulate the precise violation that occurred,¹²⁴ and “provide the applicant with any and all grounds for denial”¹²⁵ after “sufficiently examining whether the Commission’s rules were actually violated.”¹²⁶ Such notice is a fundamental tenet of due process. Despite three separate opportunities over the period of 11 years to do so, SLD has yet to provide even the most meager explanation of its decision to seek recovery of over \$1.2 million from IBM with respect to the Web Access funding request. This COMAD can no longer stand.

The COMAD for this funding request contains SLD’s boilerplate statement that “this funding request will be rescinded in full and the USAC will seek recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter.”¹²⁷ The Further Explanation Letter contains but a single sentence addressing this funding request, stating only that, “[f]or FRN 648758, USAC will seek recovery of \$1,279,631.59 from IBM disbursed for ineligible items base[d] on

¹²⁴ See, e.g., *Pattern Analysis Remand Order*, FCC 06-55, 21 FCC Rcd 5348, ¶ 1.

¹²⁵ *Caldwell Parish*, DA 08-449, 23 FCC Rcd 2784, ¶ 2 n.5; *Arkansas*, 23 FCC Rcd 9373, ¶ 1 n.5; *District of Columbia Public Schools*, 23 FCC Rcd 15585, ¶ 7 n.39; *Collegio Nuestra Senora del Carmen*, 23 FCC Rcd 15568, ¶ 18 n.62; *Albert Lea Area Schools*, 24 FCC Rcd 4533, ¶ 11, n.51.

¹²⁶ *Caldwell Parish*, at ¶ 7.

¹²⁷ COMAD (discussing FRN 648758). Despite this assertion, it is apparent on the face of the COMAD that the funding commitment was not “rescinded in full,” but merely reduced from \$2,457,027.90 to \$1,177,396.31.

information provided by IBM.”¹²⁸ The Further Explanation Letter contains no discussion whatsoever of what information SLD found significant, or the basis on which it disposed of the issues.

SLD’s lack of discussion on this point is all the more surprising because IBM, at no time, has conceded the ineligibility of the services at issue. The COMAD amount appears to be taken from a cost allocation IBM offered in August 2005.¹²⁹ Far from conceding the ineligibility of the services now the subject of the COMAD, however, that letter was merely an effort to narrow and clarify the eligibility issues confronting the parties. In that letter, IBM described the various capabilities of the “IBM Learning Village” product, identifying some aspects, such as its web hosting functionality, as eligible for support, and others that were open to question. Despite this differentiation, IBM clearly stated that, “we believe a reasonable person who compared the FY2001 [ESL] to the products and services provided as part of the Web Access for the School Community, in 2001, would conclude that this [Learning Village] functionality was eligible at that time.”¹³⁰

After receiving the IBM Aug. 17, 2005 Letter, SLD cut short the dialogue that had been underway between the parties. Rather, by the time the COMAD arrived, some two years later, SLD had determined to seek recovery of the entire amount that IBM had

¹²⁸ Further Explanation Letter, at 4.

¹²⁹ Letter from John A. (Tony) Wening and Robert H. Richter, IBM, to Phil Gieseler, Eligible Services Manager, SLD (Aug. 17, 2005), Attachment (“IBM Aug. 17, 2005 Letter”).

¹³⁰ IBM Aug. 17, 2005 Letter, at 2.

identified as open for discussion, without providing any discussion of the answers to the basic eligibility questions that remained outstanding.

The SLD Decision resolving IBM's appeal, issued more than four years later, provides no further information. The SLD Decision provides no explicit discussion of SLD's reasoning in connection with the COMAD for this funding request, limiting itself instead to the blanket statement that IBM's appeal of the COMAD for this funding request was "[d]enied."¹³¹

SLD also fails to discuss its reasons for seeking recovery of the COMAD amount solely from IBM. Despite SLD's boilerplate pledge in the COMAD to explain in the Further Explanation Letter its decision to seek recovery "from the service provider," that document is devoid of any mention of the issue. Any support for this liability determination, like that of the COMAD itself, is limited to the same single sentence alluding to unspecified information allegedly provided by IBM.

In denying IBM's appeal, SLD quotes the Commission's *Fifth Report and Order* guidance that, "the service provider is likely to be the entity that fails to deliver supported services within the relevant funding year, fails to properly bill for supported services,"¹³² and concludes, therefore, that the "service provider should be a party to whom recovery should be directed."¹³³ This is plainly inadequate and contrary to the Commission's directive to USAC. IBM delivered the services that were found to be eligible during SLD's review of the funding request, and IBM properly billed for those

¹³¹ SLD Decision, at 1.

¹³² SLD Decision, at 3-4 (*quoting Fifth Report and Order*, at ¶ 15).

¹³³ *Id.*, at 4.

services. Furthermore, regardless of what is “likely,” the Commission has clearly stated that SLD bears a responsibility for determining which party contributed to the failure under the facts of each specific case before it. In this case, SLD provides no support for its purported determination that ineligible services were delivered – the SLD Decision’s statement that the Further Explanation Letter “explains USAC’s final eligibility determination for each FRN in greater detail”¹³⁴ is woefully inaccurate, because it makes reference to a single cryptic sentence addressing Web Access – and there is no allegation at all that supported services were delivered outside the funding year or improperly billed.

Moreover, SLD asserts only that the service provider is “a party” to whom recovery should be directed, but provides no explanation whatsoever for its determination that IBM is the *only* party to whom recovery should be directed in this case. Plainly, the Statement of Work required the mutual assent of both IBM and EPISD, with EPISD required to take the lead in submitting and certifying the Form 471 and associated Item 21 attachments. SLD provides no explanation of its decision to absolve EPISD from liability and, indeed, based on EPISD’s participation, such a determination would appear questionable.

B. The Web Access Funding Request Covered Only Eligible Services

Based on FY2001 eligibility criteria, the SLD funding commitment for the Web Access funding request was properly issued, because it covered only eligible services. This funding request had four principal components:

¹³⁴ SLD Decision, at 4.

- Windows NT – the network operating system
- Lotus Domino – configured as web server software
- Server Hardware – for web server functionality
- IBM Learning Village – a web server component that facilitated applicant communication

The COMAD amount appears to be based on information in the IBM Aug. 17, 2005 Letter, which itself supplemented an earlier letter arguing that the first three components above were eligible in their entirety.¹³⁵ The Cost Allocation attached to the IBM Aug. 17, 2005 Letter turned entirely on IBM's separation of the fourth component – Learning Village – into eligible web hosting functions and “templates and features that allow teachers and students to develop, store, and modify their own content,” which IBM termed “questionable.”¹³⁶ In doing so, IBM intended to signify that, while it believed these functions eligible in FY2001, it accepted the potential for SLD to have reasonable questions on the subject, given the subsequent evolution of the ESL. The cost allocation is geared toward quantifying the amount of funding at issue with respect to these questions. Unfortunately, although SLD terminated the dialogue, it has never articulated answers to the questions framed by IBM.

Because the COMAD seeks recovery of precisely the amount of funding identified in the IBM August 17, 2005 Letter, it is apparent that SLD has no further eligibility concerns with the remaining components of the funding request. Further, from an examination of the eligibility rules in place at the time, it is clear that SLD's original funding commitment was correct.

¹³⁵ Letter from John A. (Tony) Wening and Robert H. Richter, IBM, to George McDonald, Vice President, SLD (Mar. 25, 2005), at 2-3 (“IBM Mar. 25, 2005 Letter”).

¹³⁶ IBM Aug. 17, 2005 Letter, at 1.

In FY2001, as today, web servers were eligible for E-Rate funding.¹³⁷ The January 24, 2001 ESL described an eligible web server as follows:

A Web server is a computer which [*sic*] is connected to the Internet or Intranet, stores document files and displays them to users when accessing the server via http or hypertext transfer protocol. Web server software loaded onto a file server provides the same function.¹³⁸

IBM considered the Learning Village capabilities to be fully within the scope of this definition of an eligible web server in 2001. This definition expressly provides that an eligible web server can provide either Internet or intranet connectivity. This funding request, in total, was focused on the EPISD Intranet, *i.e.*, it was designed to facilitate delivery of information to teachers and students as opposed to the public at large, and to deliver that information, in the words of the *Universal Service Order*, “all the way to individual classrooms.”¹³⁹ Further, the Learning Village software was clearly “[w]eb server software loaded onto a file server.” While the eligibility details for web servers in 2001 were not as specific as they are today, Learning Village was designed as “an essential element in the transmission of information within the school or library,”¹⁴⁰ in that it allowed students and teachers within the EPISD community to share information that they themselves created.

¹³⁷ January 24, 2001 ESL, at 32.

¹³⁸ *Id.*

¹³⁹ *Universal Service Order*, at ¶ 459 (“We find that a given service is eligible for support as a component of the institution's internal connections only if that piece of equipment is necessary to transport information all the way to individual classrooms. That is, if the service is an essential element in the transmission of information within the school or library, we will classify it as an element of internal connections and will permit schools and libraries to receive a discount on its installation and maintenance for which the telecommunications carrier may be compensated from universal service support mechanisms.”).

¹⁴⁰ *Id.*

The COMAD appears to be another example of SLD attempting to leverage *post hoc* refinements of the ESL to justify recovery of FY2001 funding commitments. In FY2001, as summarized by the Commission, a funding commitment from SLD was the only way an applicant could conclusively know whether a particular service was eligible.¹⁴¹ By FY2005, the ESL was maturing and had dropped its reference to intranet functionality in the definition of an eligible web server, stating:

A Web server is a computer file server used to provide information to users of the Internet, and can also be used to provide web-based software applications and other web-based functions.¹⁴²

In calling the eligibility of a portion of Learning Village “questionable” in 2005, IBM signified that it understood this potential source of SLD’s questions, while maintaining its contention that the services were eligible under the ESL and Commission rules as they existed in FY2001. Indeed, SLD appears to be applying these later changes to the ESL retrospectively, judging incorrectly that IBM and EPISD in 2001 should somehow have anticipated and heeded this future change. But such is not the case. In 2001, IBM and EPISD could only proceed within the evolving eligibility standards that existed at the time. All of the four components of IBM Web Access for a School Community were necessary for the functioning of the EPISD intranet, and thus the full funding request should be judged eligible under the FY2001 criteria.

SLD questions about eligibility appear to stem from a conclusion that Learning

¹⁴¹ *Third Report and Order*, at ¶ 40.

¹⁴² October 5, 2004 ESL, at 54. At the time, the elimination of the term “intranet” from the ESL left eligibility in doubt, as there was no statement one way or the other as to intranet eligibility. IBM’s understanding is that, at the present time, SLD provides funding for both Internet and intranet access.

Village provides “ineligible” collaboration capability. However, there is no reference in the January 24, 2001 ESL regarding either eligibility or ineligibility of “collaboration.” While “application software,” described in the ESL as “word processor, spreadsheet, graphics program, etc.” is indicated as ineligible, software “required for **operation of eligible equipment**” is indicated as eligible. (Emphasis in the original.) Web Access for a School Community required all four components to operate successfully, and was installed on an eligible web server.

Learning Village provided a communications capability akin to e-mail, though with two differences. First, the communications protocol for e-mail at this time was Simple Mail Transport Protocol (SMTP), while the communications protocol for web-based communication was and is Hypertext Transfer Protocol (http). This technical difference should not affect eligibility treatment, as similar communication technologies should be treated in similar ways, regardless of specific technical details. The second difference is that the Learning Village communication would be viewed on a web browser rather than a special purpose e-mail program, but, again, this is a distinction without a difference.¹⁴³

Thus, Learning Village was a web-based and server-based communications tools, fully consistent with eligibility criteria for Internal Connections designed to provide communication “all the way to individual classrooms.”

Indeed, had SLD continued its historical practice in this matter of retroactively applying whatever contemporary eligibility rules are in effect at the time it issues its

¹⁴³ As technology has progressed, many or most of today’s e-mail systems are now accessed via a web browser, though in the 2001 time period this transition was only beginning to take place.

decisions, it would have found that the FY2012 ESL once again would accept the Learning Village functionality as eligible within the larger scope of this funding request. The current ESL is clear that an eligible web hosting solution may include “website administration tools for the creation and maintenance of the website.”¹⁴⁴ This interface is precisely what Learning Village was designed to provide.

VIII. The COMAD for E-Mail Funding Is Fatally Flawed (FRN 648646)

While IBM appreciates SLD’s acceptance of certain of its arguments on appeal, and concomitant reduction of the COMAD amount associated with this funding request, two issues remain outstanding. First, IBM believes that no cost allocation is necessary or appropriate for firewall software that has no cost. Second, IBM believes that facilitating an applicant’s consideration of a service substitution as a part of a funding request is an accepted role for service providers and does not constitute ineligible activity. IBM believes that these issues should be resolved in its favor, and the COMAD cancelled in its entirety. Even to the extent that they are not, IBM believes that it does not bear sole responsibility for the error and should not bear sole liability for the recovery amount.

A. No Cost Allocation for Firewall Software Is Necessary or Appropriate

Although firewall software was not eligible in FY2001, the firewall software in this case falls squarely within the “ancillary use” principle applicable to funding requests of the era.¹⁴⁵ For FY2001, SLD had in place an “ancillary use” principle, which drew on

¹⁴⁴ Although the 2012 ESL, at 10, does not include the term “intranet,” it establishes eligibility for the features of Learning Village software, stating that a web hosting service may provide “website administration tools for the creation and maintenance of the website . . . and other features that facilitate real-time interactive communication.” In addition, “applicant-created content for an educational purpose (e.g. teacher web pages or blogs)” is also eligible.

¹⁴⁵ Firewall software is no longer ineligible, *see* 2012 ESL, at 13.

the 1997 *Universal Service Order*, which states with regard to Internet access:

If a telecommunications carrier providing Internet access offers a bundled package of content that it does not offer on an unbundled basis and thus, the fair price of the conduit element cannot be ascertained readily, the school or library may receive support for such an Internet access package only if it can affirmatively show that the price of the carrier's Internet access package was still the most cost-effective manner for the school or library to secure basic, conduit access to the Internet.¹⁴⁶

In 2001, SLD applied and expanded on this principle by determining that a component that was ineligible by itself could be included with an eligible component if there was no separate cost and the additional component was a minor element in the overall package.

This became known as “ancillary use” and was eventually adopted as a Commission rule.¹⁴⁷

The firewall software provided by IBM fits the definition of ancillary use. The E-Mail Statement of Work in question includes the task, “[i]ninstall & configure IBM I servers (2) with free firewall software.”¹⁴⁸ The firewall software in question was an integral component part of IBM’s server offering. It was not offered separately, and was a minor element of the server bundle. As the firewall software was provided for ancillary use, contrary to SLD’s finding in the SLD Decision, no cost allocation is necessary or appropriate.

¹⁴⁶ *Universal Service Order*, at ¶ 447.

¹⁴⁷ 47 C.F.R. § 54.504(e)(2) (“If a product or service contains ineligible components that are ancillary to the eligible components, and the product or service is the most cost-effective means of receiving the eligible component functionality, without regard to the value of the ineligible component, costs need not be allocated between the eligible and ineligible components. Discounts shall be provided on the full cost of the product or service. An ineligible component is “ancillary” if a price for the ineligible component cannot be determined separately and independently from the price of the eligible components, and the specific package remains the most cost-effective means of receiving the eligible services, without regard to the value of the ineligible functionality.”).

¹⁴⁸ Further Explanation Letter, at 8.

Even if a cost allocation were necessary, that asserted by SLD cannot stand. As explained in the Further Explanation Letter, at 8, “in the absence of cost allocation information submitted by IBM, USAC estimates these costs at 10% of the full installation and configuration tasks for the 50 percent of these servers that received the ineligible software.” This cost allocation, which SLD appears to have made up from whole cloth, violates the Commission’s cost allocation rule in that it is neither based on tangible criteria nor does it point to the most cost effective way for an applicant to obtain the eligible service.¹⁴⁹ The Further Explanation Letter identifies no criteria whatsoever supporting SLD’s figure of ten percent. Further, the resulting allocation of any amount, let alone almost \$3,000.00, does not result in the most cost effective way to obtain the eligible server, because IBM *did not sell* the server separately at any price.

B. No Cost Allocation for the Domino Applications Is Necessary or Appropriate

1. Costs Associated with the E-Mail Substitution Were Eligible for Support

SLD erroneously concludes that cost allocation is necessary to remove funding associated with Item 17 of the E-Mail Statement of Work, which called for IBM to “provide and install three Domino applications as pilots.”¹⁵⁰ In the Further Explanation Letter, SLD expressed its belief that, “the activities described fall within ineligible consulting that has never been eligible for funding.”¹⁵¹

SLD misunderstands the scope of this task. As IBM has explained, the original

¹⁴⁹ 47 C.F.R. § 54.504(e)(1).

¹⁵⁰ Further Explanation Letter, at 8.

¹⁵¹ *Id.*, at 8-9.

activity described in the Statement of Work involved evaluating an extension of the e-mail capability to “added-value services that the Domino platform can so powerfully provide.”¹⁵² This activity was eliminated by the applicant in favor of additional e-mail client access licenses. The activity that SLD cites was never performed.¹⁵³ Although IBM’s Lotus Notes had been specified in the E-Mail Statement of Work,¹⁵⁴ “as work was commencing, EPISD changed its mind about Lotus Notes and questioned whether it met its needs.”¹⁵⁵ This is not unusual in an ever-changing technology environment. In order to assist the customer, IBM provided a test installation so that EPISD could select the best possible alternative. As the Commission found in the *Springfield* decision, on-site engineering are eligible activities.¹⁵⁶ IBM’s position is that the activity to assist the applicant with a service substitution request was eligible on-site engineering. Although SLD asserts that the activity was “ineligible consulting,”¹⁵⁷ this difference of opinion points to the near-impossibility of understanding E-rate eligibility—the same activity can be considered either eligible or ineligible depending on which near-synonymous word is attached to it. Given that the activity clearly can be considered an on-site engineering

¹⁵² E-Mail Statement of Work, at 8.

¹⁵³ SLD recognizes this change in its Further Explanation Letter. “IBM indicates that the task originally indicated in the Statement of Work was eliminated, but also indicates that a similar task was added and performed. To aid discussion and due to these similarities, this analysis does not distinguish between the subtracted and added tasks in this instance.” (Footnote 17) SLD’s contention is not correct. An additional responsibility was undertaken by IBM as described herein, but that activity did not involve “added-value services for Domino” but rather assistance to the applicant in connection with a service substitution request for completely different e-mail software.

¹⁵⁴ E-Mail Statement of Work, at 16 (Appendix C).

¹⁵⁵ IBM Aug. 17, 2006 Letter, at 3.

¹⁵⁶ *Springfield*, at ¶ 5.

¹⁵⁷ Further Explanation Letter at 8.

task, and given that the Commission has clearly articulated that on-site engineering are eligible activities, the COMAD can not stand.

To assist a customer in determining an even better technology solution than originally anticipated serves the objectives of the E-rate program. It is well understood that service providers assist applicants with service substitution requests.¹⁵⁸ If the Commission now finds that such activities cannot be performed within an otherwise eligible E-rate contract, applicants will be put at a significant disadvantage in obtaining the best technology in an ever-changing marketplace.

Further, this funding request was reviewed in detail by SLD in connection with its initial review leading to the decision to issue a funding commitment, and again in connection with a Service Substitution submitted April 22, 2002. If SLD had any questions regarding the scope of the funding request or the eligibility of this (or any other) task, it had the resources, tools, expertise, and authority available through the review process, to request answers at that time. As the Commission has observed, in the early years of the E-Rate Program, the funding commitment, once issued, represented the applicant's and service provider's best available assurance of eligibility of their contemplated services.¹⁵⁹

2. Liability Should Not Rest Solely with IBM

As with the other funding commitments at issue in this matter, SLD has failed to articulate any sufficient basis for its determination to assess liability solely on IBM. IBM

¹⁵⁸ The result of this activity was that the customer decided on a different e-mail package than originally specified. This modification from IBM's Lotus Notes to Novell Groupwise was not in IBM's business interest, but more important was the objective to best meet the customer's needs. Despite additional costs, IBM delivered the e-mail solution within the original bid price.

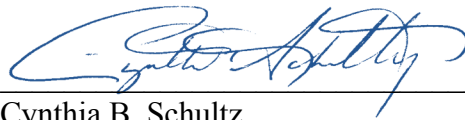
¹⁵⁹ *Third Report and Order*, at ¶ 40.

performed work related to the Domino application tasks under the applicant's direction, with the applicant's support, and for the applicant's benefit. If the Commission concludes now that the work was ineligible, then substantial responsibility must lie with the applicant, rather than with IBM.

IX. Conclusion

For the foregoing reasons, IBM urges the Commission to grant this Request for Review and reverse the SLD Decision, vacate the COMAD, and direct SLD to cease all efforts to recover funding disbursed under the Funding Requests at issue in this appeal.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Cynthia B. Schultz", is written over a horizontal line.

Cynthia B. Schultz
Patton Boggs LLP
2550 M Street NW
Washington, D.C. 20037

Counsel for IBM Corporation

March 19, 2012

Exhibit A

Letter from SLD to Cynthia B. Schultz, Patton Boggs LLP, “Administrator’s Decision on Appeal – Funding Year 2001-2002” (Jan. 19, 2012).

Cynthia B. Schultz
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037

Billed Entity Number: 142118
Form 471 Application Number: 256606
Form 486 Application Number: 156979



Administrator's Decision on Appeal - Funding Year 2001-2002

January 19, 2012

Cynthia B. Schultz
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037

Re: Applicant Name: El Paso Indep. School District
 Billed Entity Number: 142118
 Form 471 Application Number: 256606
 Funding Request Number(s): 648646, 648729, 648758, 648793, 648960
 Your Correspondence Dated: November 21, 2007

After thorough review and investigation of all relevant facts, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has made its decision in regard to your appeal of USAC's FY 2001 Notification of Commitment Adjustment and Notification of Improperly Disbursed Funds Letters for the Application Number indicated above. This letter explains the basis of USAC's decision. The date of this letter begins the 60 day time period for appealing this decision to the Federal Communications Commission (FCC). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 648729, 648758, 648793, 648960
Decision on Appeal: Denied
Explanation:

In Funding Year 2001, El Paso Independent School District (El Paso ISD) submitted FCC Form 471 #256606 to the Schools and Libraries Division (SLD) of USAC seeking funding for eight internal connections Funding Request Numbers (FRNs) and one Internet access FRN. IBM Corporation is the service provider associated with each of these FRNs. USAC funded these requests and eventually disbursed \$55.3 million to IBM for providing the products and services to El Paso ISD.

USAC later learned that the FRNs may not have been in compliance with FCC rules governing SLD. On September 16, 2004, USAC requested that IBM respond to questions concerning eligibility for the services and entities funded. USAC later contacted El Paso ISD for information related to certain FRNs for which El Paso ISD could provide relevant information.

After thorough review of the documentation, USAC determined that ineligible products and services were provided for certain FRNs and sought to adjust the commitment amount. USAC also determined that funds were improperly disbursed for one FRN, and that recovery should be sought from both IBM and El Paso ISD. On November 21, 2007, IBM submitted an appeal of the Notification of Commitment Adjustment and Notification of Improperly Disbursed Funds Letters in relation to the following FRNs: 648646, 648758, 648793, 648960, and 648729.

As part of the appeal, you make several arguments. The arguments are reiterated below with (A) identifying each appellant argument. The USAC response to each appellant argument is listed directly beneath each argument, with (U) identifying the USAC response.

A1) THE ISSUANCE OF THE COMAD IS NOT TIMELY UNDER COMMISSION REGULATIONS AND, THEREFORE, IS UNENFORCEABLE.

U1) USAC was within the time frame to proceed with recovery actions. The FCC established a five-year administrative time period for completing investigations and audits in the *Schools & Libraries Fifth Report and Order*.¹ The FCC stated

[W]e will initiate and complete any inquiries to determine whether or not statutory or rule violations exist within a five year period after final delivery of service for a specific funding year . . . Under the policy we adopt today, USAC and the Commission shall carry out any audit or investigation that may lead to discovery of any violation of the statute or rule within five years of the final delivery date of service for a specific funding year. In the E-Rate context, disbursements often occur for a period up to two years beyond the funding year . . . For consistency, our policy for audits and other investigations mirrors the time that beneficiaries are required to retain documents pursuant to the rule adopted in this order. We believe that conducting inquiries within five years strikes an appropriate balance between preserving the Commission's fiduciary duty to protect the fund against waste, fraud, and abuse and the beneficiaries' need for certainty and closure in their E-Rate application process. *Id.* at ¶¶ 32-33.

The Commission further explained that this administrative five-year period was not the same as the five-year time frame established pursuant to the Debt Collection Improvement Act of 1996 ("DCIA"), in that this time frame was the "time period within which we must bring action to establish a debt due to violations of the E-Rate program rules or statutory provisions. In contrast, the DCIA statute limitations relates to the time period within which we must act to collect the debt once established." *Id.* at ¶ 32 n.55.

¹ *In the Matter of Schools and Libraries Universal Support Mechanism*, Fifth Report and Order, CC Docket No. 02-6, 19 FCC Rcd 15808, 15819, at ¶32 (2004) ("*Fifth Report & Order*").

In the present matter, USAC determined that IBM and El Paso violated program rules for Funding Year 2001. According to USAC records, the last date for service on the cited FRNs is September 30, 2002. USAC commenced the investigation of this matter in 2004 and issued funding recovery letters on September 25, 2007 which is before the deadline to COMAD of September 30, 2007, USAC complied with the requirements of the *Fifth Report and Order* and will not rescind its COMAD/RIDF action on this basis.

A2) USAC PROPERLY APPROVED THE SERVICES PROVIDED IN THE FRNS AT ISSUE AND IBM'S AND EPISD'S RELIANCE ON USAC'S ELIGIBILITY APPROVAL WAS PROPER

U2) USAC originally approved the equipment and service request for these FRNs based on the documentation that was provided to support the application at the time of its initial review. After funding was issued, it came to USAC's attention that the support documentation did not accurately detail the equipment and services that were actually delivered. After allowing both IBM and El Paso ISD to respond and submit additional information to USAC's investigation into this matter, it was determined that a recovery of funding was necessary for erroneously disbursed funding.

A3) USAC IS NOT LEGALLY AUTHORIZED TO ISSUE A COMAD BASED ON PROCEDURAL VIOLATIONS OCCURRING IN FY2001 THAT DO NOT AMOUNT TO VIOLATIONS OF A FEDERAL STATUTE

U3) The COMAD Order states, "Specifically, we direct USAC to adjust such commitments by: (1) cancelling all or any part of a commitment to fund discounts for ineligible services or the provision of telecommunications services by non-telecommunications carriers and (2) denying payment of any requests by providers for compensation for discounts provided on such services."²

A4) USAC IMPROPERLY APPLIED THE FOURTH REPORT AND ORDER BY ISSUING THE COMADS TO IBM

U4) USAC improperly disbursed funding for services that were not provided or equipment that was not installed as approved on the applicant's FY 2001 FCC Form 471. FCC rules authorize USAC to disburse funds to service providers for providing supported services to eligible entities³. These rules are violated if the service provider receives payment for services and/or products that were not delivered to the eligible entity. In the Fifth Report and Order, the Commission stated that it would not be appropriate "for a beneficiary to retain an overpayment if, for some reason, USAC has mistakenly disbursed an amount in excess of that which the entity is allowed under our rules"⁴. The FCC further states that "the service provider is likely to be the entity that fails to deliver supported services within the relevant funding year, fails to properly

² See FCC 99-291 para 1.

³ 47 C.F.R. secs. 54.501(a), 54.517.

⁴ See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15817-18, FCC 04-190 para. 29 (rel. Aug. 13, 2004).

bill for supported services” and therefore, the service provider should be a party to whom recovery should be directed⁵. USAC provided the opportunity for both IBM and El Paso ISD to support claims of eligibility and/or to provide a cost allocation for ineligible. USAC’s letter dated September 25, 2007,⁶ explains USAC’s final eligibility determination for each FRN in greater detail.

A5) THE COMAD REGARDING “MAINTENANCE” (FRN 648793) WAS ISSUED IN ERROR BY DEEMING THE SERVICES PROVIDED AS INELIGIBLE. THE COMAD’S RELIANCE ON GUIDANCE IN THE THIRD ORDER’S QUALIFICATIONS IS EXPRESSLY PROSPECTIVE

U5) As detailed in USAC’s September 27, 2007⁷ letter of further explanation, USAC determined, consistent with the *Universal Service Order*⁸, that this FRN included substantial ineligible items. The details related to this FRN indicate that in order to provide the services, IBM created an extensive facility for maintenance support. For example, information submitted to the House Oversight Committee indicates that up to \$16 million of the funding request was used for developing the infrastructure and tools as opposed to the delivery of actual, eligible support services.⁹ The ineligible items are those which were used to create the facility and which are not eligible in themselves.

While basic maintenance services of eligible components are eligible, the creation of an extensive support structure for the delivery of those services is not eligible. Services well beyond a basic level were provided, as evidenced of cost per site in excess of half a million dollars. USAC has provided ample opportunity for IBM and El Paso ISD to submit specific information in support of their position that only eligible services were provided. However, neither IBM nor El Paso ISD have provided documentation – such as records of the actual services provided – to support their arguments that only eligible services were provided. Additionally, although USAC disbursed the full amount committed for this FRN, IBM states that services were provided for only five and a half

⁵ See Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., Schools and Libraries Universal Service Support Mechanism, CC Docket Nos. 96-45, 97-21, 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, 15257, FCC 04-181 para. 15 (rel. Jul. 30, 2004).

⁶ Letter Re: *Further Explanation of Commitment Adjustment Letters and Recovery of Improperly Disbursed Funds Letter to El Paso Independent School District and IBM Corporation Funding Year 2001 FCC Form 471 #256606* from Schools and Libraries Division, USAC, to Ms. Christine Hill, IBM and Mr. Jack S. Johnston, El Paso ISD, September 25, 2007.

⁷ *Id.* at 14-22.

⁸ See 47 C.F.R. §§ 54.504, 54.511; In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, (rel. May 8, 1997) (*Universal Service Order*)

⁹ Problems with the E-rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of our Nation’s Schools to the Internet Part 3: Hearing before the Subcomm. On Oversight and Investigations of the House Comm. On Energy and Commerce, 108th Cong., pp. 260-262, 563-564 (2004) (*Hearing Record*).

months¹⁰. Therefore, a portion of the cost for these products and services were billed, but could not have been delivered. USAC has determined that IBM's cost allocation was not acceptable. Therefore, instead of rescinding the entire amount, USAC applied an appropriate cost allocation¹¹. Since IBM billed for services and products that were not delivered and/or ineligible, IBM is the party that committed the violation and therefore, USAC is correctly seeking recovery from IBM.

A6) WEB & FILE SERVERS COMAD (FRN 648960) BASED ON FLAWED COST ALLOCATION

U6) USAC has determined that this request contained ineligible products: storage of end user files. El Paso ISD submitted a cost allocation for the FRN recognizing that the file store was "subject to dispute"¹². Upon reviewing the cost allocation, USAC determined that it did not meet the standard of being based on "tangible information that provides a realistic result"¹³ and therefore, applied a cost allocation approach that is typically used for cost allocation as applicable to file servers.

A7) COMAD IS INCONSISTENT WITH PRIOR FCC GUIDANCE AND SLD RULES REGARDING COST ALLOCATION (FRN 648960)

U7) USAC does not prohibit cost allocation methods that adhere to the standard of being based on "tangible information that provides a realistic result." The proposed cost allocation method by El Paso ISD did not achieve the aforementioned standard. Consistent with generally accepted cost allocation methods, USAC utilized a "straight line" cost allocation method. The USAC website illustrates how this method of cost allocation may be applied to servers.¹⁴

A8) SLD ERRED IN NOT ISSUING THE COMAD DIRECTLY TO EPISD FOR FRN 648960

U8) USAC is correct in seeking recovery of improperly disbursed funds from the service provider, IBM Corporation, and the applicant. IBM was responsible for configuring the servers to allow for the storage, IBM is partially responsible for the violation and therefore, USAC is correctly seeking recovery from IBM and the applicant.

A9) USAC EXCEEDED ITS AUTHORITY IN CONDUCTING A COST EFFECTIVENESS REVIEW OF A 6 YEAR OLD TRANSACTION (FRN 648729)

¹⁰ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, Re Maintenance FRN, August 17, 2006.

¹¹ See <http://www.usac.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx> for cost allocation guidelines.

¹² Letter from Louis Mona, Interim Executive Director, Technology and Information Systems, El Paso ISD, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, August 19, 2006 at 3 (*El Paso 2006 Letter*).

¹³ <http://www.usac.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx>

¹⁴ See <http://www.usac.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx>, See Example 3.

U9) USAC is correct for seeking recovery of funds relevant to service delivery. IBM has not provided any legal or factual support that discounts USAC's authority to perform reviews on post-commitment applications of any age. USAC is obligated to ensure that services and products requested be installed at eligible entities. USAC does not contest whether the services were installed at eligible entities. However, the original FRN pricing was based on 90 locations in the Item 21 but the installation was only for 53 locations. IBM reduced the material cost by \$641,762, but did not reduce the installation costs. USAC does find that a decrease in the number of sites and equipment warrants a proportionate decrease in labor. IBM states in their letter of appeal that the, "IBM bid is a fixed price for Video products and services. As such, IBM bore the risk of absorbing any cost overruns."¹⁵ The risk of IBM absorbing any cost overruns would constitute in a violation of the free services advisory. The provision of free services must be accounted for in the competitive bidding process. USAC finds the argument of absorbing cost overruns is without merit. USAC approved the request based on the statement of work citing 90 sites and finds that a proportionate decrease in labor is justified.

Funding Request Number(s): 648646
Decision on Appeal: Partially Approved
Explanation:

**SLD ERRED BY DEEMING CERTAIN E-MAIL SERVICES PROVIDED PURSUANT TO
FRN 648646 INELIGIBLE FOR REIMBURSEMENT**

USAC agrees with the rationale provided by IBM regarding Items 1-3 in USAC's letter dated September 25, 2007. USAC sought to recover funds for tasks identified as those necessary in order to conduct a proper competitive bidding process. The determination of the size of the server and hard drives that should be purchased is an ineligible pre-planning task. Based on your response, however, "Specify email server sizing and configuration" was for configuring the servers and partitioning the hard drives for the school and, as such, is considered a part of installation activity. The task performed by IBM is necessary to the successful installation of an e-mail server. Planning, assessment, and development of architecture are often tasks performed prior to the filing of the FCC Form 471. The unique nature of El Paso's e-mail systems being replaced necessitated "Perform planning and assessment for e-mail deployment" and "Develop distributed e-mail architecture" that would not be able to be performed until there was full access to the pre-existing system which would be accomplished after a contract was signed and after the filing of the FCC Form 471. As a result, USAC grants the portion of the appeal for Items 1-3. However, the appeal is partially approved since funding is still partially rescinded to remove the ineligible firewall software with installation and configuration (\$2,963.81 post-discount) and the costs associated with ineligible provision and installation of three Domino applications (\$59,276.22 post-discount). The denials of your other arguments were explained in the above sections.

¹⁵ Letter Re: *Appeal of Notification of Commitment Adjustment Letter for Funding Year 2001 ("COMAD") to El Paso Independent School District and IBM Corporation dated September 25, 2007* from Ms. Cynthia Shultz, IBM to Schools and Libraries Division, USAC, November 21, 2007.

Since the Administrator's Decision on Appeal modifies the commitment adjustment for your application, USAC will issue a Revised Funding Commitment Decision Letter (RFCDL) to you and to each service provider that provides the services approved for discounts in this letter. USAC will issue the RFCDL to you as soon as possible. The RFCDL will inform you of the precise dollar value of your approved funding request(s). As you await the RFCDL, you may share this Administrator's Decision on Appeal with the relevant service provider(s).

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either the SLD or the Federal Communications Commission (FCC). For appeals that have been denied in full, partially approved, dismissed, or cancelled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

CC: Terri Jordan
El Paso Indep. School District
6531 Boeing Dr.
El Paso, TX 79925

Exhibit B

The COMAD:

Letter from SLD to Christine Hill, IBM, “Notification of Improperly
Disbursed Funds Letter, Funding Year 2001: 7/01/2001-6/30/2002”
(Sept. 25, 2007)

Letter from SLD to Christine Hill, IBM, “Notification of Commitment
Adjustment Letter, Funding Year 2001: 7/01/2001-6/30/2002”
(Sept. 25, 2007)

Letter from SLD to Jack S. Johnston, EPISD, “Notification of Commitment
Adjustment Letter, Funding Year 2001: 7/01/2001-6/30/2002”
(Sept. 25, 2007)

Notification of Improperly Disbursed Funds Letter
Funding Year 2001: 7/01/2001 - 6/30/2002

September 25, 2007

Christine Hill
International Business Machines Corporation
3039 Cornwallis Road, Building 203
Research Triangle Park, NC 27709

Re: SPIN: 143005607
Form 471 Application Number: 256606
Funding Year: 2001
FCC Registration Number: 0011588688
Applicant Name: EL PASO INDEP SCHOOL DISTRICT
Billed Entity Number: 142118
Applicant Contact Person: Jack S. Johnston

Our routine review of Schools and Libraries Program funding commitments has revealed certain applications where funds were disbursed in violation of program rules.

In order to be sure that no funds are used in violation of program rules, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) must now recover these improper disbursements. The purpose of this letter is to inform you of the recoveries as required by program rules, and to give you an opportunity to appeal this decision. USAC has determined the service provider is responsible for all or some of the program rule violations. Therefore, the service provider is responsible to repay all or some of the funds disbursed in error.

This is NOT a bill. The next step in the recovery of improperly disbursed funds process is for SLD to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of the Demand Payment Letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." Please see the "Informational Notice to All Universal Service Fund Contributors, Beneficiaries, and Service Providers" at <http://www.universalservice.org/fund-administration/tools/latest-news.aspx#083104> for more information regarding the consequences of not paying the debt in a timely manner.

TO APPEAL THIS DECISION

If you wish to appeal the Notification of Improperly Disbursed Funds decision indicated in this letter, your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Improperly Disbursed Funds Letter and the Funding Request Numbers you are appealing. Your letter of appeal must also include the applicant name, the Form 471 Application Number, Billed Entity Number, and the FCC Registration Number from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Improperly Disbursed Funds Letter that is the subject of your appeal to allow the SLD to more readily understand your appeal and respond appropriately. Please keep your letter specific and brief, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal electronically, please send your appeal to appeals@sl.universalservice.org using the organization's e-mail. If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Dept. 125 - Correspondence Unit, 100 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC web site or by calling the Client Service Bureau at 1-888-203-8100. We strongly recommend that you use the electronic appeals option.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC web site or by calling the Client Service Bureau. We strongly recommend that you use the electronic filing options.

FUNDING DISBURSEMENT REPORT

On the pages following this letter, we have provided a Funding Disbursement Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from the application for which recovery is necessary. Immediately preceding the Report, you will find a guide that defines each line of the Report. The SLD is also sending this information to the applicant for informational purposes. If USAC has determined the applicant is also responsible for any rule violation on these Funding Request Numbers, a separate letter will be sent to the applicant detailing the necessary applicant action. The Report explains the exact amount the service provider is responsible for repaying.

Schools and Libraries Division
Universal Services Administrative Company

cc: Jack S. Johnston
EL PASO INDEP SCHOOL DISTRICT

A GUIDE TO THE FUNDING DISBURSEMENT REPORT

Attached to this letter will be a report for each funding request from the application cited at the top of this letter for which a Recovery of Improperly Disbursed Funds is required. We are providing the following definitions.

FUNDING REQUEST NUMBER (FRN): A Funding Request Number is assigned by the SLD to each individual request in a Form 471 once an application has been processed. This number is used to report to applicants and service providers the status of individual discount funding requests submitted on a Form 471.

CONTRACT NUMBER: The number of the contract between the applicant and the service provider. This will be present only if a contract number was provided on the Form 471.

SERVICES ORDERED: The type of service ordered by the applicant, as shown on Form 471.

BILLING ACCOUNT NUMBER: The account number that you established with the applicant for billing purposes. This will be present only if a Billing Account Number was provided on the Form 471.

FUNDING COMMITMENT: This represents the amount of funding that SLD had reserved to reimburse for the approved discounts for this service for this funding year.

FUNDS DISBURSED TO DATE: This represents the total funds that have been paid to you for this FRN as of the date of this letter.

FUNDS TO BE RECOVERED FROM SERVICE PROVIDER: This represents the amount of Improperly Funds Disbursed to Date for which the service provider has been determined to be primarily responsible. These improperly disbursed funds will have to be recovered from the service provider.

DISBURSED FUNDS RECOVERY EXPLANATION: This entry provides the reason the adjustment was made.

**Funding Disbursement Report
for Form 471 Application Number: 256606**

Funding Request Number:	648729
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Funding Commitment:	\$3,902,493.60
Funds Disbursed to Date:	\$3,324,008.12
Funds to be Recovered from Service Provider:	\$742,075.13

Disbursed Funds Recovery Explanation:

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter.

Notification of Commitment Adjustment Letter
Funding Year 2001: 7/01/2001 - 6/30/2002

September 25, 2007

Christine Hill
International Business Machines Corporation
3039 Cornwallis Road, Building 203
Research Triangle Park, NC 27709

Re: SPIN: 143005607
Form 471 Application Number: 256606
Funding Year: 2001
FCC Registration Number 0011588688
Applicant Name: EL PASO INDEP SCHOOL DISTRICT
Billed Entity Number: 142118
Applicant Contact Person: Jack S. Johnston

Our routine review of Schools and Libraries Program funding commitments has revealed certain applications where funds were committed in violation of program rules.

In order to be sure that no funds are used in violation of program rules, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) must now adjust the overall funding commitment. The purpose of this letter is to make the adjustments to the funding commitment required by program rules, and to give you an opportunity to appeal this decision. USAC has determined the service provider is responsible for all or some of the program rule violations. Therefore, the service provider is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for SLD to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of the Demand Payment Letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." Please see the "Informational Notice to All Universal Service Fund Contributors, Beneficiaries, and Service Providers" at <http://www.universalservice.org/fund-administration/tools/latest-news.aspx#083104> for more information regarding the consequences of not paying the debt in a timely manner.

TO APPEAL THIS DECISION:

If you wish to appeal the Commitment Adjustment Decision indicated in this letter, your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Numbers you are appealing. Your letter of appeal must include the Billed Entity Name, the Form 471 Application Number, Billed Entity Number, and the FCC Registration Number (FCC RN) from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow the SLD to more readily understand your appeal and respond appropriately. Please keep your letter specific and brief, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal electronically, please send your appeal to appeals@sl.universalservice.org using your organization's e-mail. If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Dept. 125- Correspondence Unit, 100 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC web site or by contacting the Client Service Bureau at 1-888-203-8100. We strongly recommend that you use the electronic appeals option.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket Nos. on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site, or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options

FUNDING COMMITMENT ADJUSTMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from the application for which adjustments are necessary. Immediately preceding the Report, you will find a guide that defines each line of the Report.

The SLD is also sending this information to the applicant for informational purposes. If USAC has determined the applicant is also responsible for any rule violation on these Funding Request Numbers, a separate letter will be sent to the applicant detailing the necessary applicant action.

Please note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount. Please note the Funding Commitment Adjustment Explanation in the attached Report. It explains why the funding commitment is being reduced. Please ensure that any invoices that you or the applicant submit to USAC are consistent with program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds the Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the service provider is responsible for repaying.

Schools and Libraries Division
Universal Services Administrative Company

cc: Jack S. Johnston
EL PASO INDEP SCHOOL DISTRICT

A GUIDE TO THE FUNDING COMMITMENT ADJUSTMENT REPORT

Attached to this letter will be a report for each funding request from your application for which a commitment adjustment is required. We are providing the following definitions.

FUNDING REQUEST NUMBER (FRN): A Funding Request Number is assigned by the SLD to each individual request in your Form 471 once an application has been processed. This number is used to report to applicants and service providers the status of individual discount funding requests submitted on a Form 471.

CONTRACT NUMBER: The number of the contract between the applicant and the service provider. This will be present only if a contract number was provided on Form 471.

SERVICES ORDERED: The type of service ordered by applicant, as shown on Form 471.

BILLING ACCOUNT NUMBER: The account number that you have established with your customer for billing purposes. This will be present only if a Billing Account Number was provided on the Form 471.

ORIGINAL FUNDING COMMITMENT: This represents the original amount of funding that SLD had reserved to reimburse for the approved discounts for this service for this funding year.

COMMITMENT ADJUSTMENT AMOUNT: This represents the amount of funding that SLD has rescinded because of program rule violations.

ADJUSTED FUNDING COMMITMENT: This represents the adjusted total amount of funding that SLD has reserved to reimburse for the approved discounts for this service for this funding year. If this amount exceeds the Funds Disbursed to Date, the SLD will continue to process properly filed invoices up to the new commitment amount.

FUNDS DISBURSED TO DATE: This represents the total funds that have been disbursed for this FRN as of the date of this letter.

FUNDS TO BE RECOVERED FROM SERVICE PROVIDER: This represents the amount of improperly disbursed funds to date for which the service provider has been determined to be primarily responsible. These improperly disbursed funds will have to be recovered from the service provider.

FUNDING COMMITMENT ADJUSTMENT EXPLANATION: This entry provides an explanation of the reason the adjustment was made.

Funding Commitment Adjustment Report
Form 471 Application Number: 256606

Funding Request Number:	648646
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Original Funding Commitment:	\$3,229,025.65
Commitment Adjustment Amount:	\$180,792.47
Adjusted Funding Commitment:	\$3,048,233.18
Funds Disbursed to Date:	\$3,229,025.25
Funds to be Recovered from Service Provider:	\$180,792.47
Funding Commitment Adjustment Explanation:	

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**

Funding Request Number:	648758
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Original Funding Commitment:	\$2,457,027.90
Commitment Adjustment Amount:	\$1,279,631.59
Adjusted Funding Commitment:	\$1,177,396.31
Funds Disbursed to Date:	\$2,457,027.87
Funds to be Recovered from Service Provider:	\$1,279,631.59
Funding Commitment Adjustment Explanation:	

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**

Funding Request Number:	648793
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Original Funding Commitment:	\$24,409,530.00
Commitment Adjustment Amount:	\$16,402,072.35
Adjusted Funding Commitment:	\$8,007,457.65
Funds Disbursed to Date:	\$24,409,530.00
Funds to be Recovered from Service Provider:	\$16,402,072.35

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**

Funding Request Number:	648960
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Original Funding Commitment:	\$5,850,540.00
Commitment Adjustment Amount:	\$3,319,815.00
Adjusted Funding Commitment:	\$2,530,725.00
Funds Disbursed to Date:	\$3,374,300.63
Funds to be Recovered from Service Provider:	\$843,575.00
Funding Commitment Adjustment Explanation:	

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the applicant and the service provider as per the attached Further Explanation Letter.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**



Schools & Libraries Division

Notification of Commitment Adjustment Letter**Funding Year 2001: 7/01/2001 - 6/30/2002**

September 25, 2007

Jack S. Johnston
EL PASO INDEP SCHOOL DISTRICT
120 N. Stanton
El Paso, TX 79901

Re: Form 471 Application Number: 256606
Funding Year: 2001
Applicant's Form Identifier: Yr4 - IBM (90)
Billed Entity Number: 142118
FCC Registration Number: 0006985857
SPIN Name: International Business Machines Corporation
Service Provider Contact Person: Christine Hill

Our routine review of Schools and Libraries Program funding commitments has revealed certain applications where funds were committed in violation of program rules.

In order to be sure that no funds are used in violation of program rules, the Universal Service Administrative Company (USAC) must now adjust your overall funding commitment. The purpose of this letter is to make the adjustments to your funding commitment required by program rules, and to give you an opportunity to appeal this decision. USAC has determined the applicant is responsible for all or some of the program rule violations. Therefore, the applicant is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for USAC to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of the Demand Payment Letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." Please see the "Informational Notice to All Universal Service Fund Contributors, Beneficiaries, and Service Providers" at <http://www.universalservice.org/fund-administration/tools/latest-news.aspx#083104> for more information regarding the consequences of not paying the debt in a timely manner.

TO APPEAL THIS DECISION:

If you wish to appeal the Commitment Adjustment Decision indicated in this letter, your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Numbers you are appealing. Your letter of appeal must include the Billed Entity Name, the Form 471 Application Number, Billed Entity Number, and FCC Registration Number (FCC RN) from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow the SLD to more readily understand your appeal and respond appropriately. Please keep your letter specific and brief, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal electronically, please send your appeal to appeals@sl.universalservice.org using your organization's e-mail. If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Dept. 125 - Correspondence Unit, 100 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Appeals Area of the SLD section of the USAC web site or by contacting the Client Service Bureau at 1-888-203-8100. We strongly recommend that you use the electronic appeals options.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC web site, or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

FUNDING COMMITMENT ADJUSTMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from your application for which adjustments are necessary. Immediately preceding the Report, you will find a guide that defines each line of the Report.

The SLID is also sending this information to your service provider(s) for informational purposes. If USAC has determined the service provider is also responsible for any rule violation on these Funding Request Numbers, a separate letter will be sent to the service provider detailing the necessary service provider action.

Please note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount. Please note the Funding Commitment Adjustment Explanation in the attached Report. It explains why the funding commitment is being reduced. Please ensure that any invoices that you or your service provider submit to USAC are consistent with program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds your Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the applicant is responsible for repaying.

Schools and Libraries Division
Universal Services Administrative Company

cc: Christine Hill
International Business Machines Corporation

A GUIDE TO THE FUNDING COMMITMENT ADJUSTMENT REPORT

A report for each E-rate funding request from your application for which a commitment adjustment is required is attached to this letter. We are providing the following definitions for the items in that report.

FUNDING REQUEST NUMBER (FRN): A Funding Request Number is assigned by the SLD to each individual request in your Form 471 once an application has been processed. This number is used to report to applicants and service providers the status of individual discount funding requests submitted on a Form 471.

SERVICES ORDERED: The type of service ordered from the service provider, as shown on Form 471.

SPIN (Service Provider Identification Number): A unique number assigned by the Universal Service Administrative Company to service providers seeking payment from the Universal Service Fund for participating in the universal service support mechanisms. A SPIN is also used to verify delivery of services and to arrange for payment.

SERVICE PROVIDER NAME: The legal name of the service provider.

CONTRACT NUMBER: The number of the contract between the applicant and the service provider. This will be present only if a contract number was provided on your Form 471.

BILLING ACCOUNT NUMBER: The account number that your service provider has established with you for billing purposes. This will be present only if a Billing Account Number was provided on your Form 471.

SITE IDENTIFIER: The Entity Number listed in Form 471, Block 5, Item 22a. This number will only be present for "site specific" FRNs.

ORIGINAL FUNDING COMMITMENT: This represents the original amount of funding that SLD had reserved to reimburse you for the approved discounts for this service for this funding year.

COMMITMENT ADJUSTMENT AMOUNT: This represents the amount of funding that SLD has rescinded because of program rule violations.

ADJUSTED FUNDING COMMITMENT: This represents the adjusted total amount of funding that SLD has reserved to reimburse for the approved discounts for this service for this funding year. If this amount exceeds the Funds Disbursed to Date, the SLD will continue to process properly filed invoices up to the new commitment amount.

FUNDS DISBURSED TO DATE: This represents the total funds that have been paid to the identified service provider for this FRN as of the date of this letter.

FUNDS TO BE RECOVERED FROM APPLICANT: This represents the amount of improperly disbursed funds to date as a result of rule violation(s) for which the applicant has been determined to be responsible. These improperly disbursed funds will have to be recovered from the applicant.

FUNDING COMMITMENT ADJUSTMENT EXPLANATION: This entry provides an explanation of the reason the adjustment was made.

**Funding Commitment Adjustment Report for
Form 471 Application Number: 256606**

Funding Request Number:	648960
Services Ordered:	INTERNAL CONNECTIONS
SPIN:	143005607
Service Provider Name:	International Business Machines Corporation
Contract Number:	RFP# 101-00
Billing Account Number:	
Site Identifier:	142118
Original Funding Commitment:	\$5,850,540.00
Commitment Adjustment Amount:	\$3,319,815.00
Adjusted Funding Commitment:	\$2,530,725.00
Funds Disbursed to Date:	\$3,374,300.63
Funds to be Recovered from Applicant:	\$843,575.00
Funding Commitment Adjustment Explanation:	

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the applicant and the service provider as per the attached Further Explanation Letter.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**

Exhibit C

Letter of Appeal from Cynthia B. Schultz, Patton Boggs LLP to SLD,
“Appeal Notification of Commitment Adjustment Letter Funding Year 2001
(‘COMAD’) to El Paso Independent School District and IBM Corporation
dated September 25, 2007” (Nov. 21, 2007).

November 21, 2007

Cynthia B. Schultz
202-457-6343
cschultz@pattonboggs.com

VIA ELECTRONIC FILING

Letter of Appeal
Schools and Libraries Division – Correspondence Unit
100 S. Jefferson Road
P.O. Box 902
Whippany, NJ 07981

Re: Appeal of Notification of Commitment Adjustment Letter Funding Year
2001 ("COMAD") to El Paso Independent School District and IBM
Corporation dated September 25, 2007

Dear Sir/Madam:

In response to the referenced COMAD, IBM Corporation ("IBM"), respectfully disagrees with the decision of the Schools and Libraries Division and hereby submits this timely Appeal to the Universal Service Administrative Company.

The relevant information regarding this Appeal is as follows:

SPIN	143005607
Form 471 Application Number	256606
Funding Year	2001
Billed Entity Number	142118
FRNs	648646, 648758, 648793, 648960, 648729

BACKGROUND

Pursuant to and in compliance with the applicable competitive bid requirements, IBM and the El Paso Independent School District ("EPISD") contracted in 2001 for IBM to provide certain IT products and services. EPISD selected IBM after evaluating competitive bids from IBM and seven other vendors, following a negotiated solicitation process in accordance with Texas State procurement regulations, FCC rules and SLD requirements in effect at the time. The whole of the project was large and complex. Deploying a modern enterprise network is not a simple task: "[a] district with 50,000 students plus thousands of teachers and administrators has networking requirements that are at least as complex as those of a small city."¹ EPISD was such a district. At the relevant time, it served over 60,000 students in schools with over 8,000 employees.² Providing a networking solution to accommodate that number of people in that many locations rivals complex commercial installations.

EPISD recognized the immense complexity this project entailed. It followed an open and transparent procurement process. EPISD presented its recommendation to select IBM in open, public meetings. The Board of Trustees then voted in favor of the recommendation and authorized the contract. Subsequently, EPISD and IBM entered into a contract. EPISD submitted Federal Communications Commission ("FCC" or "Commission") Form 471 #256606 to the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC" or the "Administrator") seeking funding for internal connections and Internet access products and services from the E-rate Program ("Program").

The funding request was comprised of nine (9) separate Funding Request Numbers ("FRNs") under the "Program" as follows:

FRN #	Subject		FRN #	Subject
648646	E-mail		648909	Server Upgrades
648729	Video		648960	Web & File Servers
648758	Web Access		648996	Network Cabling
648793	Maintenance		648594	Internet Access
648857	Network Electronics			

¹ *Problems with the E-rate Program: Waste, Fraud and Abuse Concerns in the Wiring of our Nation's Schools to the Internet Part 3 Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 108th Cong. 248 (2004) (statement of Christopher G. Caine, Vice President, Governmental Programs, International Business Machines Corporation).*

² *Id.* at 249.

On September 28, 2001, SLD deemed the contracted service eligible for Funding Year ("FY") 2001 in compliance with USAC's programmatic rules and federal statute and regulations. In strict reliance on that decision, IBM proceeded to perform its obligations pursuant to its contract with EPISD and delivered the required services in a satisfactory manner. SLD properly disbursed funds to IBM in exchange for the work performed.

Almost 6 years later, on September 25, 2007, USAC issued IBM a Commitment Adjustment and Recovery of Improperly Disbursed Funds Letter ("COMAD Justification Letter or "COMAD")³ and two Notification of Commitment Adjustment Letters ("COMAD Notification Letters")⁴ regarding the following FRNs:

FRN	Subject	Amount Disbursed	Reimbursement Sought	Party
648646	E-mail	\$3.229M	\$180.1K	IBM
648729	Video	\$3.324M	\$742K	IBM
648758	Web Access	\$2.45M	\$1.28M	IBM
648793	Maintenance	\$24.4M	\$16.4M	IBM
648960	Web & File Servers	\$3.374M	\$843K	IBM and EPISD
Total:			\$19.448M	

IBM received the COMAD Justification Letter and COMAD Notification Letters on October 1, 2007, more than five years after the expiration of the funding under which IBM provided the services at issue and more than five years after USAC properly approved the funding after a very careful and comprehensive pre-commitment and post-commitment application review. As demonstrated by the chart above, USAC is seeking sole reimbursement from IBM on four FRNs and joint reimbursement on one FRN (648960).

IBM asserts that the COMAD is unsupported by law and contains material factual and procedural errors. In addition, USAC exceeded its authority in issuing the COMAD and also issued the COMAD to the wrong party.

IBM provided good and valuable products and services to EPISD in exchange for agreed upon compensation. Pursuant to the contract between EPISD and IBM,

³ Exhibit 1, COMAD Justification Letter from USAC to IBM, dated Sept. 25, 2007.

⁴ Exhibit 2, COMAD Notification Letter from USAC to IBM, dated Sept. 25, 2007 (FRN648729) and COMAD Notification Letter from USAC to IBM, dated Sept. 25, 2007 (FRNs 648646, 648758, 648793, and 648960).

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EPISD is contractually required to pay for the services it received. USAC's actions, in essence, place the burden on EPISD--a very poor and needy school district--to make IBM whole for services that it provided to EPISD based upon USAC's eligibility approval in FY2001.

USAC's action to seek recovery more than five years after the services were provided and paid for is contrary to law and policy. To do so creates instability and uncertainty. It is inequitable, unjust, and unfair and is inconsistent with the central tenet of the Program as envisioned by Congress and articulated by the FCC—mainly, to provide our nation's poorest and neediest children with access to the Internet.⁵

IBM hereby appeals such decision as set forth in more detail below.

ISSUES FOR APPEAL

1. THE COMAD IS FATALLY FLAWED AND WAS ISSUED IN ERROR.

As set forth more fully below, the COMAD was issued with substantial procedural errors and, consequently, is unenforceable.

A. THE ISSUANCE OF THE COMAD IS NOT TIMELY UNDER COMMISSION REGULATIONS AND, THEREFORE, IS UNENFORCEABLE.

In its *Fifth Report and Order*, the Commission implemented an administrative limitations period for inquiries related to into potential statutory or rule violations under the Program.⁶ The rule holds that any such inquiries shall be completed within a five year period after "final delivery of service for a specific funding year."⁷ This rule is designed to provide applicants and service providers "certainty of the timing" with respect to recovery actions.⁸ In creating and adopting this rule, the Commission recognized the inherent unfairness of seeking recovery from applicants and service providers many years after the disbursements have been made and contracts performed, as is the case here.

⁵ *In re Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, New Orleans, LA, et al.*, Order, 21 FCC Rcd 5316, ¶2 (2006).

⁶ *In re Schools and Libraries Universal Service Support Mechanism*, Fifth Report and Order and Order, 19 FCC Rcd 15808, ¶32 (2002) ("Fifth Report and Order").

⁷ *Id.*

⁸ *Id.*, ¶31.

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In this case, USAC is barred from seeking recovery on three of the five FRNs. USAC completed its inquiry on September 25, 2007, the date on which it issued the COMAD. As set forth in the following table, USAC failed to complete its inquiry in accordance with the Commission's rule for three of the FRNs that are the subject of the COMAD.

FRN	Final Delivery Date for FY2001	Administrative Limitation Period Expiration
648729 - Video	September 18, 2002 ⁹	September 18, 2007
648758 - Web Access	September 18, 2002 ¹⁰	September 18, 2007
648793 - Maintenance	June 30, 2002 ¹¹	June 30, 2007

As is plainly illustrated above, the issuance of the COMAD on September 25, 2007, was in violation of the five year administrative limitations period for the FRNs established by the Commission. USAC had ample opportunity to seek reimbursement in a timely manner, and it failed to do so. There is simply no legitimate reason why USAC failed to complete its inquiry in a prompt and timely manner. USAC's failure to "bring an action to establish a debt" within the limitations period as expressly required by the Commission in the *Fifth Report and Order* irrevocably bars it now from seeking recovery for the three FRNs listed above, each of which fall outside of the five-year administrative limitations period.¹²

B. USAC PROPERLY APPROVED THE SERVICES PROVIDED IN THE FRNS AT ISSUE AND IBM'S AND EPISD'S RELIANCE ON USAC'S ELIGIBILITY APPROVAL WAS PROPER.

USAC acknowledged that it conducted its original review pursuant to the programmatic and federal rules in effect in FY2001 and found "no significant eligibility issues . . . under then -current review procedures."¹³ Indeed, during its review process in FY2001, USAC even identified certain ineligible components in

⁹ This FRN covered a project for which the final date of delivery was September 18, 2002. Exhibit 3.

¹⁰ This FRN covered a project for which the final date of delivery was September 18, 2002. Exhibit 4.

¹¹ The services supported by USAC for FY2001 were provided through June 30, 2002. Exhibit 5.

¹² *Fifth Report and Order*, ¶32.

¹³ See Exhibit 6, Eligibility Analysis attached to Letter from USAC to IBM, dated Sept. 16, 2004 at page 1 of 8.

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the funding requests and appropriately removed the costs for the ineligible components.¹⁴

In FY2001, the Program was still in its nascent stages. USAC's procedures and Commission rules were different in FY2001 than those of today. USAC's procedures and Commission rules have been in a constant state of development and evolution as evidenced by the hundreds of programmatic changes made by USAC and Appeals and Orders issued by the FCC since the inception of the Program.

The Eligible Services List ("ESL") itself has been considerably refined since FY2001. It is an area of extreme complexity and has been the subject of constant change, unclear definition, and intricate nuances. The content of the ESL pertaining to the internal connections category of Program services was created and drafted by USAC, not the FCC or Congress. In FY2001, the ESL was simply part of USAC's administrative procedures and fell outside of the domain of Public Notice and Comment. In 2003, the Commission recognized the need for the adoption of a more formalized process to determine eligibility because the ESL lacked clarity, definition, and direction provided by the Administrator.

As a result, in December 2003, the Commission issued its *Third Report and Order* in which it adopted a formalized process including public notice and comment.¹⁵ By explaining that the purpose of the new rule was "to facilitate the ability of both vendors and applicants to determine what services are eligible for discounts," the Commission emphasized the poor state of understanding by applicants and service providers as to the eligibility of items under the Program at that time.¹⁶

It was standard practice that approved SLD funding indicated that the services and products sought were eligible. The Commission clearly understood this standard practice. In fact, the only "sure bet" that the applicants and service providers could rely upon for eligibility was SLD's issuance of a positive FCDL. Therefore, the Commission attempted to insert more stability into the process through the establishment of a more transparent and procedurally fair ESL process laid out in the *Third Report and Order*.

¹⁴ *Id.*

¹⁵ *In re Schools and Libraries Universal Service Support Mechanism*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912 (2003) ("Third Report and Order").

¹⁶ *Id.*, ¶40.

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The Commission clearly articulated this understanding in the *Third Report & Order* when it stated that “[c]urrently, the only way an applicant can determine whether a particular service or product is eligible under current rules is to seek funding for that service or product, and then seek review of the Administrator’s decision to deny discounts.”¹⁷ Therefore, it follows that prior to the issuance of the updated ESL procedures, where USAC granted approval, applicants and service providers were entitled to rely on that approval as confirmation that USAC deemed eligible the services and equipment funded.

In this case, USAC reviewed the applications covering the subject FRNs, and approved them during FY2001, well in advance of the release of the *Third Report and Order*. IBM and EPISD justifiably relied upon such review and approval and should not be subject to USAC’s second guessing years after the services were bought and paid for.

C. **USAC IS NOT LEGALLY AUTHORIZED TO ISSUE A COMAD BASED ON PROCEDURAL VIOLATIONS OCCURRING IN FY2001 THAT DO NOT AMOUNT TO VIOLATIONS OF A FEDERAL STATUTE.**

The Commission, in its original *Commitment Adjustment Order*,¹⁸ established the basis upon which USAC could issue Commitment Adjustments:

We direct USAC to adjust commitments of discount funding made to schools and libraries that filed applications for discount funding, the disbursement of ***which would violate a federal statute.***¹⁹

The language is clear—a violation of a federal statute, not merely a violation of USAC administrative procedure, is required to issue a Commitment Adjustment.

For each of the FRNs at issue, USAC cited only to alleged procedural violations, that is, to alleged programmatic rule violations that have not been codified by Commission’s rules.²⁰ The COMAD failed to articulate any violation of a federal

¹⁷ *Id.*

¹⁸ *In re Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Schools and Libraries Universal Service Support Mechanism*, Order, 14 FCC Rcd 2769 (1999) (“Commitment Adjustment Order”).

¹⁹ *Id.*, ¶11 (emphasis added).

²⁰ USAC cannot rely upon its cost allocation analysis in this case for the FRNs at issue, because in FY2001 any cost allocation violation would have been considered a procedural violation. The Commission expressly acknowledged this in its *Third Report and Order*, by expressly amending its rules to adopt USAC’s cost allocation guidelines. *Third Report and Order*, ¶¶ 31-38. USAC

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statute and, therefore, USAC's decision fails as a matter of law. Notwithstanding its attempt to do so in the COMAD, USAC cannot remedy this by relying upon post FY2001 FCC Orders and USAC procedures.

The expansion of the circumstances under which a Commitment Adjustment may be issued to include certain procedural (not solely statutory) violations came in 2004 in the *Fifth Report and Order*, well after the end of FY2001. Even then, the Commission acknowledged that recovery of disbursed funds **later** found to be a procedural violation do not require recovery, "except to the extent that such rules are essential to the financial integrity of the program, as designated by the agency, or that circumstances suggest the possibility of waste, fraud, or abuse, which will be evaluated on a case-by-case basis."²¹ Thus, even if it were proper for USAC to apply the later rules in issuing a COMAD (which IBM contends it is not), there is no allegation that the disbursement of funds under the instant FRNs rise to the level for recovery specified in the *Fifth Report and Order*.

Simply put, USAC has no authority to seek reimbursement for any of the FRNs in this Appeal.

D. USAC IMPROPERLY APPLIED THE COMMISSION'S FOURTH REPORT AND ORDER BY ISSUING THE COMADS TO IBM.

Until the Commission's *Fourth Report and Order*,²² the Commission sought reimbursement only from the service providers pursuant to its rules set forth in the *Commitment Adjustment Order*.²³ In the *Fourth Report and Order*, the Commission ruled that recovery of funds should be directed to "the party or parties that committed the rule or statutory violation in question."²⁴

The Commission acknowledged that the "service provider simply is not in a position to ensure that all applicable statutory and regulatory requirements have been met."²⁵ In reaching its decision, the Commission found that (1) "[the]

concedes this point in stating that its existing cost allocation guidelines were codified in the *Third Report and Order*. See Exhibit 7, USAC Letter to IBM and EPISD, dated June 19, 2006, at 2 fn.3.

²¹ *Fifth Report and Order*, ¶19.

²² *In re Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., and Schools and Libraries Universal Service Support Mechanism*, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252 (2004) ("Fourth Report and Order").

²³ *Fourth Report and Order*, ¶ 9 and *Commitment Adjustment Order*, ¶7.

²⁴ *Fourth Report and Order*, ¶10.

²⁵ *Id.*, ¶12.

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service provider does not have the authority or ability to review the eligibility of the requested services,” (2) “[the] service provider does not provide data contained in funding application,” (3) “[the] service provider may be totally unaware that applicant is not in compliance with the rules”, and (4) “[the] service provider has limited ability to monitor how applicant uses service.”²⁶ As a result, the Commission properly amended its rules to allow for recovery from the applicants.

USAC failed to conduct an appropriate analysis and misapplied the Commission’s rules set forth in the *Fourth Report & Order* by seeking recovery from IBM, not EPISD, for four of the FRNs. It is the applicant, not the service provider, that certifies as to the eligibility on the FCC Form 471. USAC was obligated to seek recovery of funds from EPISD for each FRN and not IBM.

2. EVEN ASSUMING, ARGUENDO, THAT THE COMAD SURVIVES ITS SUBSTANTIAL PROCEDURAL FLAWS, IT WAS ISSUED IN ERROR WITH REGARD TO THE SPECIFIC ALLEGATIONS UNDER VARIOUS FRNs.

As set forth more fully below, the COMAD was issued with substantial errors relating to the specific services provided and, consequently, it is unenforceable.

A. THE COMAD REGARDING “MAINTENANCE” (FRN 648793) WAS ISSUED IN ERROR.

i. THE COMAD’S RELIANCE ON GUIDANCE IN THE THIRD ORDER IS IN DIRECT CONTRADICTION OF COMMISSION GUIDANCE BECAUSE THE THIRD ORDER’S QUALIFICATION IS EXPRESSLY PROSPECTIVE.

In its COMAD, SLD erroneously states that the “help desk” provided by IBM pursuant to the subject FRN went beyond “basic maintenance” and, therefore, is ineligible. SLD takes its support for this finding from the *Third Report and Order*, which found that a help desk system “**typically**” (but not always) “goes beyond” basic maintenance.²⁷ Even if the *Third Report and Order* deemed all help desks to be ineligible in a wholesale manner (which it clearly did not), SLD’s reliance on the *Third Report and Order* is improper because the relevant guidance and clarification regarding “basic maintenance” was intended by the Commission to

²⁶ *Id.*, ¶12 n.32.

²⁷ *Third Report and Order*, ¶24 (emphasis added).

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be **prospective** in nature and therefore can not be applied to services predating the *Third Report and Order*.²⁸

Recognizing the ambiguity and the need for clarification around the meaning of “basic maintenance,” the Commission saw fit to “**prospectively clarify**” the definition of basic maintenance.²⁹ In fact, the Commission expressly admitted that its “rules do not expressly specify the types of maintenance costs that are eligible for support.”³⁰

The Commission only directed SLD to review contracts “in existence as of the effective date of this Order,” not contracts that had already expired.³¹ Specifically, the Commission instructed USAC to “review and fund requests for discounts on maintenance services in accordance with this clarification *as of the effective date of this Order*.”³² The Commission applied the rule prospectively because it recognized the inherent unfairness and potential illegality of reopening contracts fully performed.

It is clear that USAC did not have the authority to interpret the Commission’s definition of eligibility.³³ If it did not have the authority in FY2001, it certainly does not have the authority today to apply and overlay new clarifying rules on those in place and properly relied upon by EPISD and IBM in FY2001. Consequently, any action by SLD to apply this Commission guidance on a retroactive basis and seek to recover funds under expired contracts does not comport with the Commission’s express guidance in its *Third Report and Order* and should not be allowed.

ii. **SLD ERRED BY DEEMING THE SERVICES PROVIDED PURSUANT TO THE SUBJECT FRN INELIGIBLE.**

As discussed above, in FY2001 the eligibility status of various products and services referenced on the ESL was less than clear. This was especially true for installation and maintenance services. The *Universal Service Order* expressly authorized support for “basic installation and maintenance services necessary to

²⁸ *Id.*, ¶22 (emphasis added).]

²⁹ *Id.*, ¶¶22-24.

³⁰ *Id.*, ¶22.

³¹ *Id.*

³² *Id.*, ¶24 (emphasis added).

³³ See 47 CFR §54.702(c).

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the operation of the internal connections network.”³⁴ The *Universal Service Order* did not define or provide clarification of what is meant by “basic installation and maintenance,” as the Commission expressly admits in its *Third Report and Order* (“[O]ur rules do not expressly specify the types of maintenance costs that are eligible for support....”).³⁵ The Commission also chose not to place any “specific restrictions on the size, i.e., type, of the internal connections covered.”³⁶ The decision by the Commission to prospectively clarify the eligibility requirements of basic maintenance in its *Third Report and Order* inexorably leads to the conclusion that the prior eligibility deserves broader interpretation in effect for basic maintenance sought by EPISD and provided by IBM in FY2001.

There is nothing in the *Universal Service Order* or any other rule or procedure contemporaneous with the EPISD application in FY2001 that deems ineligible a “help desk” *per se*. It is, as explained above, improper for SLD to rely on the Commission’s **prospective** guidance in the 2003 *Third Report and Order* clarifying the meaning of “basic maintenance” for a FY2001 contract. However, even under that later guidance, the subject services are eligible.

The *Third Report and Order* did not specify that all “help desks” are *per se* ineligible under the Program. To the contrary, they are only ineligible to the extent they provide “any ineligible features or functions.”³⁷ The Commission’s language related to this issue in the *Ysleta Independent School District* decision (“*Ysleta*”), issued shortly before the *Third Report and Order*, is instructive.³⁸ In that case, the Commission cautioned that SLD should reject applications for technical support that fall outside what is specified as eligible under the *Universal Service Order*:

For instance, calls from end-users may involve problems with end-user workstation operating systems and hardware, and Help Desks typically field questions about the operation and configuration of end-user software.³⁹

³⁴ *In re Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶460 (1997) (“Universal Service Order”).

³⁵ *Third Report and Order*, ¶22.

³⁶ *Id.*

³⁷ *Id.*, ¶24.

³⁸ *In re Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, TX, et al.*, Order, 18 FCC Rcd 26406 (2003) (“*Ysleta*”).

³⁹ *Ysleta*, ¶64.

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Here, IBM did not provide any support for ineligible products under this FRN.⁴⁰ Rather, IBM specifically designed the maintenance for EPISD so that calls for support for ineligible hardware and software would not be routed to or logged by the IBM support personnel under this FRN. Therefore, the maintenance services provided under this FRN as part of the technical support office was properly approved as eligible.

SLD's cost effective arguments relating to the size of the expenditure in this instance is wholly irrelevant.⁴¹ A competitive bid process was conducted, which is designed to ensure reasonable market pricing. SLD funded and paid on all of these FRNs with full knowledge as to the price and supporting documentation. If SLD had any questions about the price, it was incumbent upon SLD to raise those questions during its initial pre and post commitment review prior to the issuance of a positive funding commitment.

Any commercial vendor providing cost-effective maintenance must use tools, facilities, communications, transportation, administrative labor and a variety of supporting resources. The equipment to be maintained at the EPISD was spread across 52 buildings, sites and locations serving over 60,000 students and 8,000 staff members. There is simply no way to provide cost-effective technical support without sufficient infrastructure to dispatch and administer support calls. The EPISD itself called the help desk critical to the functioning of the system – and it was part and parcel of the basic maintenance provided to the EPISD. The fact of the matter is that the maintenance was provided for eligible items in a manner that met the applicable eligibility requirements. Accordingly, SLD's finding that the maintenance services are ineligible because those services include certain infrastructure for dispensing and administering the maintenance is not supported by the *Universal Service Order* and should not be allowed.

The Commission clearly noted in the *Universal Service Order* that it should not place any "specific restrictions on the size, i.e., type, of the internal connections network covered."⁴² In the instant case, EPISD requested internal connections for dozens of sites that connected tens of thousands of students and faculty. Given the size, complexity, and breadth of the network, it was completely reasonable for EPISD to seek these services and for IBM to provide these services for basic maintenance in FY2001. Now, on the eve of FY2008, USAC's

⁴⁰ See Richter Declaration.

⁴¹ SLD's cost effective analysis is unsupportable, has no basis in law, and, as applied, renders the competitive bid process meaningless.

⁴² *Universal Service Order*, ¶460.

attempt in the COMAD to supplant an original approval with *de facto* arguments not based in fact or law is improper and unsupported.

In sum, EPISD applied for the funds at a time when the definition of “basic maintenance” was vague at best. The funding requests underwent multiple levels of pre-commitment and post-commitment review by SLD and were approved. The price was clearly known to SLD during its review. As a result, EPISD was correct in relying on SLD’s approval to mean that SLD had deemed the services and equipment sought in the application to be eligible and within the meaning of “basic maintenance” and it is improper for SLD to reverse that decision now.

B. THE COMAD REGARDING “WEB & FILE SERVERS” (FRN 648960) WAS BASED ON AN FLAWED COST ALLOCATION AND IN ANY EVENT SHOULD HAVE BEEN SOLELY SERVED UPON EPISD.

i. THE ISSUED COMAD IS INCONSISTENT WITH PRIOR COMMISSION GUIDANCE AND SLD’S OWN RULES REGARDING COST ALLOCATION.

In its *Third Report and Order*, the Commission plainly states: “For products or services that contain an ineligible functionality on an ancillary basis, the Administrator does not require the allocation of any portion of the cost to the ineligible use.”⁴³

The purpose of the servers at issue was for authentication. SLD admits that such use is eligible. The additional use of the servers to store student files is clearly a coincidental use. It is true, as SLD points out, that the servers consist of many components such as memory modules, central processing units, etc. All of those components, however, are required for the central purpose of the servers – their eligible use as authentication servers. No additional processing power, memory or any other components of the servers (other than the additional hard drives) is required for the servers also to house supplemental storage.

The post FY2001 cost allocation analysis performed by SLD throughout 2005 and 2006 is improper; it also presupposes that the use of the authentication servers to hold supplementary student file storage is other than a coincidental use. That simply is not the case and is a factual error. Consequently, the only adjustment required is for the components of the authentication servers used

⁴³ *Third Report and Order*, ¶32.

directly for the supplementary file storage, namely the hard disk drives. It is unreasonable to expect (or require) EPISD to purchase duplicate servers for student file storage when the authentication servers (using no more than the required internal components) could achieve that task. Requiring schools to purchase redundant hardware runs counter to the Program's central goal of providing cost effective IT solutions for eligible schools.

ii. **SLD ERRED IN NOT ISSUING THE COMAD DIRECTLY TO EPISD.**

In the *Fourth Report and Order*, the Commission recognized and acknowledged "that the beneficiary in many situations is the party in the best position to ensure compliance with the statute and [the Commission's rules]."⁴⁴ The Commission further noted that the "school or library is the entity that undertakes the various necessary steps in the application process, and receives the direct benefit of any service rendered. . . . The school or library is the entity that submits FCC Form 471, notifying the Administrator of the services that have been ordered, the service providers with whom it has entered into agreements, and an estimate of the funds needed to cover the discounts to be provided on eligible services."⁴⁵

IBM did not "reconfigure" the servers at issue in order for them to be put to a use for supplementary file storage (as specified above, the only additional components were the hard drives). EPISD took the action to put the authentication services to an ineligible use. It is, therefore, improper to seek reimbursement from IBM in this case, because it did not control the use to which the servers were put. Consequently, to the extent that any repayment is due with regard to this FRN, the payment should be made by EPISD, not IBM.

Significantly, as IBM argues here, the Commission recognized that "in many situations, the service provider simply is not in a position to ensure that all applicable statutory and regulatory requirements have been met."⁴⁶ In support of this statement, the Commission acknowledges that (1) "the service provider does not have authority or ability to review the eligibility of the requested services", (2) service provider does not provide data contained in funding application", (3) **"service provider may be totally unaware that applicant is not in compliance with rules"**, and (4) **"service provider has limited ability to monitor how applicant uses service."**⁴⁷ In this case, EPISD directed the use to

⁴⁴ *Fourth Report and Order*, ¶11.

⁴⁵ *Id.*

⁴⁶ *Id.*, ¶12.

⁴⁷ *Id.* (emphasis added).

which the equipment was put. Consequently, SLD erred in not issuing the COMAD regarding the Web and File Server FRN solely to EPISD.

C. SLD ERRED BY DEEMING CERTAIN E-MAIL SERVICES PROVIDED PURSUANT TO FRN 648646 INELIGIBLE FOR REIMBURSEMENT.

The COMAD seeks reimbursement for services described in Items 1-3, 12 and 17, as identified in Attachment 2 to SLD's letter to IBM dated June 19, 2006. With respect to Items 1-3, SLD argues that the services at issue constitute "consulting" and are, therefore, ineligible. IBM acknowledges that the 2001 ESL states that the "cost associated with services provided by consultants retained to assist schools and libraries" is not eligible. The services that were provided by IBM under Items 1-3, however, do not constitute "services provided by consultants" and are, in fact, eligible.

Items 1 and 2 are described as follows: "Perform planning and assessment for e-mail deployment" and "Develop Distributed E-mail Architecture." When IBM began its work at EPISD, EPISD had no centralized e-mail system. EPISD required that the new system be implemented in such a way as to not lose existing e-mail on the various and disparate systems that existed. An inherent part of the installation of a complex e-mail system under these circumstances requires a service provider to analyze how to install the system and maintain the integrity of the existing data before setting up the new e-mail system (e.g., determining internal configuration of servers, mailbox structures, account parameters, password parameters and similar activities necessary for implementation of the e-mail system). Setting up these various parameters is part and parcel of installation of eligible services and, thus, is itself eligible.⁴⁸ "Consulting" services have more to do with deciding what technology to employ, rather than planning how to deploy it.

When conducting reviews, it is important for SLD to look beyond simple naming conventions and review the services provided. It did so in FY2001 and found the products and services to be eligible. Reliance upon simple naming conventions leads to wrong decisions. It is incumbent upon SLD to understand the eligibility of the products and services its funds. It is improper for it to second guess its earlier determinations and to blame the schools, libraries, or service providers after the fact, because it is rethinking the rules along the way. Here, the use of

⁴⁸ FY2001 Schools and Libraries Eligible Services List 38 (2000), http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_122900.pdf.

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the word “consulting” is irrelevant. The actual services provided were eligible. SLD concluded so and funding for services covered by Items 1 and 2 was proper.

Item 3 is described as follows: “Specify e-mail server sizing and configuration.” The reference to “sizing and configuration” applies to the sizing and partitioning of the internal hard drives of the server and internal configuration of the server prior to putting it into operation. These activities are fundamental to any installation and do not involve decisions about what technology to employ. As the services in question are clearly not “consulting services”, such services were also eligible for funding under the FY2001 ESL.

IBM and EPISD justifiably relied on SLD’s eligibility decisions and subsequent FCDL approval of Program funding and fulfilled the terms of the contract for the specified e-mail services. For the foregoing reasons, SLD erroneously deemed the services described in Items 1-3 as ineligible.

D. SLD EXCEEDED ITS AUTHORITY IN UNILATERALLY CONDUCTING A REASONABLENESS PRICE REVIEW OF A SIX YEAR OLD TRANSACTION.

Unlike the other FRNs at issue in this appeal, the substance of the COMAD with regard to Video FRN has nothing to do with eligibility. USAC freely admits that it has determined that “no ineligible services were actually provided” in respect of the Video FRN.⁴⁹ Rather, SLD takes issue with the cost effectiveness of the Video FRN,⁵⁰ but fails to provide any legal or factual support that the price paid was, compared to market rates that existed at the time, unreasonable or not cost-effective.

The competitive bidding processes and procedures are designed to ensure a reasonable, competitive price for the eligible services. Cost effectiveness is driven by the competitive bid process and USAC has no statutory authority to second guess the cost effectiveness of any expenditure under the Program. It is patent error for USAC to make its own retroactive determination about what the price should be based on a mistaken understanding of the number of intended sites. The Form 471 submitted by EPISD referenced 52 sites (not 90) with a fixed price amount that was approved by SLD.

IBM bid a fixed price for the Video products and services. As such, IBM bore the risk of absorbing any cost overruns. The labor portion of the FRN was a ceiling.

⁴⁹ See Exhibit 1, COMAD Justification Letter at 9.

⁵⁰ SLD’s cost effective analysis is flawed, procedurally infirm, and unsupported by law.

IBM Letter of Appeal

November 21, 2007

All of the funds allocated for the installation were billed and paid. If the cost of installing the video equipment had exceeded that amount, IBM would have been unable to recover any additional funds.

The reduction in the number of sites resulted in a reduction in charges by \$641,762; it does not hold that there must be a corresponding decrease in the labor portion. The labor portion of the eligible services was properly put to competitive bid and properly awarded under the applicable rules. USAC approved the funding for the 52 sites at the price requested and IBM and EPISD relied on that decision in moving forward with the project. There is simply no basis for SLD to reverse its decision years after the fact.

CONCLUSION

For the reasons and arguments set forth in this Appeal, USAC should find in favor of IBM with respect to FRNs 648646, 648729, 646758, 648793, and 648960 and grant this Appeal.

Sincerely,



Cynthia B. Schultz
Counsel for IBM Corporation

DECLARATION OF ROBERT H. RICHTER

1. My name is Robert H. Richter. I am the National E-Rate Program Executive for IBM Corporation.
2. All of the facts set forth in the Appeal and in this Declaration are true and correct to the best of my knowledge.
3. IBM provided no support under the Maintenance FRN for ineligible products, including PCs, printers, or telephones.
4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21 day of November, 2007.

A handwritten signature in black ink, appearing to read 'B. Richter', written in a cursive style.

Robert H. Richter

DECLARATION OF TONY WENING

1. My name is Tony Wening. I am the National E-Rate Program Executive for IBM Corporation.
2. All of the facts set forth in the Appeal are true and correct to the best of my knowledge
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of November, 2007.

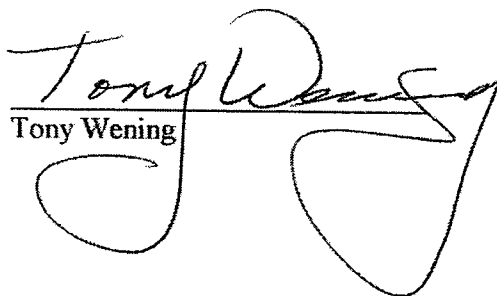

Tony Wening

Exhibit 1

September 25, 2007

International Business Machines Corporation
Ms. Christine Hill
3039 Cornwallis Road
Building 203
Research Triangle Park, NC 27709

RE: Further Explanation of Commitment Adjustment Letters and Recovery of
Improperly Disbursed Funds Letter to El Paso Independent School District and
IBM Corporation
Funding Year 2001 FCC Form 471 # 256606

Dear Ms. Hill:

Under separate cover, you are being sent Commitment Adjustment and Recovery of Improperly Disbursed Funds Letters (Notification Letters) concerning the FCC Form 471 Application Number cited above. **Please be advised that the Notification Letters are the official action on this application by the Universal Service Administrative Company (USAC). Please refer to those letters for instructions regarding how to appeal the Administrator's decision, if you wish to do so.** The purpose of this letter is to provide you with additional information concerning the reasons for USAC's Commitment Adjustments and Recovery of Improperly Disbursed Funds decisions.

Factual Background

In Funding Year 2001, El Paso Independent School District (El Paso ISD) submitted FCC Form 471 # 256606 to the Schools and Libraries Division (SLD) of USAC seeking funding for eight internal connections Funding Request Numbers (FRNs) and one Internet access FRN. IBM Corporation (IBM) is the service provider associated with each of these FRNs. USAC funded these requests and eventually disbursed \$55.3 million to IBM related to these FRNs.

USAC later learned that the FRNs may not have been in compliance with Federal Communications Commission (FCC or Commission) rules governing the Schools and Libraries program. On September 16, 2004, USAC notified IBM of its initial eligibility determinations for each FRN based on documentation that had been provided to USAC after USAC made its original funding decision, and requested that IBM respond to

USAC's eligibility determinations.¹ USAC later contacted El Paso ISD for information related to certain FRNs for which El Paso ISD could provide relevant information. Since that time, IBM and El Paso ISD have responded to USAC's preliminary eligibility determinations and questions. On June 19, 2006, USAC provided El Paso ISD and IBM with its eligibility determinations and provided a final opportunity for El Paso and IBM to submit additional information to enable USAC to make its final recovery determinations.² IBM and El Paso ISD each responded to USAC's June 2006 Letter. USAC has carefully considered the responses from IBM and El Paso ISD as explained in detail below, and has determined that ineligible products and services were provided for certain FRNs, that funds were improperly disbursed for one FRN, and that recovery should be sought from IBM and El Paso ISD as explained below.

Regulatory Background

In preparing request(s) for funding, applicants seeking discounted services through the Schools and Libraries program must follow certain competitive bidding requirements. An applicant initiates the competitive bidding process when an applicant submits an FCC Form 470 to USAC for posting on the USAC website.³ This posting enables prospective service providers to bid on the equipment and services for which the applicant will request universal service support. After the FCC Form 470 has been posted, the applicant must wait at least 28 days before entering into agreements with service providers, must comply with all applicable state and local procurement laws, and must comply with the other competitive bidding requirements established by the FCC.⁴ Upon selecting the service provider(s), applicants submit FCC Form 471 on an annual basis specifying, among other things, the services to be provided and the cost.⁵

Schools and Libraries program rules authorize USAC to provide universal service support to telecommunications carriers and non-telecommunications carriers for providing supported services to eligible entities.⁶ Each funding year, the Commission approves an Eligible Services List (ESL), which provides details about eligible equipment and services, and the conditions under which they are eligible.⁷ USAC makes funding decisions consistent with the guidance in the ESL for each funding year. With

¹ See Letter from George McDonald, Vice President, Schools and Libraries Division, USAC, to Bob Richter, National ERate Program Executive, IBM Corporation, September 16, 2004 (*September 2004 Letter*).

² See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, USAC to Bob Richter and Tony Wening, National ERate Program Executive, IBM Corporation, Terri Jordan, Executive Director, Business Services, Technology and Information Systems, El Paso Independent School District, June 19, 2006 (*June 2006 Letter*).

³ See 47 C.F.R. § 54.504(b); Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806 (FCC Form 470).

⁴ See 47 C.F.R. §§ 54.504, 54.511; In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Red 8776, ¶ 575 (rel. May 8, 1997) (*Universal Service Order*).

⁵ See 47 C.F.R. §§ 54.504(c), 54.507(d) (2000); Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Item 25 (October 2000)(FCC Form 471).

⁶ See 47 C.F.R. §§ 54.501(a), 54.502, 54.503, 54.517, 54.518, 54.519, 54.522.

⁷ See 47 C.F.R. 54.522.

the exception of ancillary ineligible components, where products and services contain eligible and ineligible components, "costs must be allocated to the extent that a clear delineation can be made between the eligible and ineligible components. The delineation must have a tangible basis, and the price for the eligible portion must be the most cost-effective means of receiving the eligible service."⁸ The cost allocation must be based on tangible criteria that provides a realistic result.⁹ When USAC is not provided with the information necessary to separate the eligible and ineligible portions, USAC generally rescinds the entire commitment for that FRN and seeks recovery of the full amount disbursed.¹⁰

The Commission requires USAC to rescind funding commitments and seek recovery of funds disbursed when USAC determines that it committed funds in error because the commitment constitutes a violation of the Communications Act of 1934, as amended;¹¹ or a violation of Commission rules.¹² USAC also seeks recovery of Improperly Disbursed funds when funds were disbursed in violation of the statute or Commission rules, but the original commitment was consistent with the statute or Commission rules. When USAC determines that both eligible and ineligible products and services have been provided, USAC adjusts the funding commitment and seeks recovery of the ineligible portion only. Applicants and service providers, who disagree with any of USAC's commitment adjustment and/or recovery decisions, can appeal those decisions to USAC and/or the Commission.¹³

Overview of USAC's Determinations

USAC has reviewed the documentation provided by IBM and/or El Paso ISD and has determined that no commitment adjustments or recoveries will be sought at this time for FRNs 648909, 648594, 648857, or 648996 based on the information provided. For

⁸ 47 C.F.R. § 54.504(g). This rule codified existing guidelines for allocating costs between eligible and ineligible services. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, ¶ 31 (2003) (*Schools and Libraries Third Order*).

⁹ <http://www.universalservice.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx>.

¹⁰ See *Schools and Libraries Third Order*, 18 FCC Rcd 26912, ¶ 32 (2003).

¹¹ 47 U.S.C. § 254.

¹² See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, FCC 99-291 (1999) (*Commitment Adjustment Order*); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 15 FCC Rcd 7197 (1999) (*Commitment Adjustment Waiver Order*); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 15 FCC Rcd 22975 (2000) (*Commitment Adjustment Implementation Order*); *Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21, 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252 (2004) (*Schools and Libraries Fourth Order*); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808 (2004) (*Schools and Libraries Fifth Order*).

¹³ See 47 C.F.R. §§ 54.719-54.725.

the remaining FRNs, USAC seeks recovery of a total of \$19,448,146.54 from IBM and/or El Paso ISD. For FRN 648758, USAC will seek recovery of \$1,279,631.59 from IBM disbursed for ineligible items base on information provided by IBM. For FRNS 648646, 648729, 648793, and 648960, in the paragraphs below, USAC explains the basis for its eligibility and recovery determinations. USAC has carefully considered IBM and El Paso ISD's responses, and has determined that commitments need to be adjusted and recovery sought as set forth in the table below.

FRN	DESCRIPTION	COMMITMENT	DISBURSEMENT	RECOVERY AMOUNT	PARTY
648729	Vidco	\$3,902,493.60	\$3,324,008.12	\$742,075.13	IBM
648758	Web access	\$2,457,027.90	\$2,457,027.87	\$1,279,631.59	IBM
648960	File Servers	\$5,850,540.00	\$3,374,300.00	\$843,575.00	IBM and El Paso ISD
648646	E-mail	\$3,229,025.65	\$3,229,025.65	\$180,792.47	IBM
648793	Maintenance	\$24,409,530.00	\$24,409,530.00	\$16,402,072.35	IBM
	Total			\$19,448,146.54	

E-MAIL FUNDING REQUEST - FRN 648646

USAC committed \$3,229,025.65 for this FRN and disbursed the full amount to IBM. USAC identified 17 descriptions, out of approximately 44, in the relevant Statement of Work that appeared to indicate ineligible components. IBM responded that products and services for Design and Engineering, Training, and Provide Documentation are eligible for funding.¹⁴ Additionally, IBM provided a list of services for which it was unsure whether the items were eligible for funding.

IBM also submitted an unexecuted Change Authorization to support its position that ineligible services which were initially included in the Statement of Work were never performed.¹⁵ IBM stated that this Change Authorization eliminated the ineligible items, and that "SLD was not invoiced for these tasks."¹⁶ However, USAC reviewed invoicing documentation submitted by IBM and/or El Paso ISD to USAC for this FRN and has determined that USAC was invoiced and disbursed funds for ineligible items that were included on the Statement of Work, but purportedly eliminated by the Change Authorization. That is, services which were eliminated by the Change Authorization were in fact delivered and funds were disbursed. USAC provided copies of the records supporting this conclusion to IBM and El Paso ISD. Because the Change Authorization

¹⁴ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to George McDonald, Vice President, Schools and Libraries Division, USAC, March 25, 2005.

¹⁵ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Phil Gieseler, Eligible Services Manager, Schools and Libraries Division, USAC, August 17, 2005.

¹⁶ *Id.*

was unexecuted, and because the documentation in USAC's files conflicted with the Change Authorization, USAC initially rejected the Change Authorization as a basis for determining which products and services were provided for this FRN.

The Statement of Work for the E-mail FRN provided a description of 47 separate tasks. USAC assigned a number to each of these, and will refer to that number in the discussion below. As stated above, USAC's analysis determined that 17 of these descriptions raised eligibility questions. After considering the information submitted, USAC classifies these services as follows:

1. With respect to Items 1-3, IBM argues that certain activities are not ineligible planning, but rather are eligible design and engineering costs. USAC rejects the majority of these arguments and has conducted a cost allocation based on the information available.
2. With respect to Items 4-6, IBM has provided information that USAC accepts as a resolution.
3. With respect to Items 6-17, IBM has now submitted signed Change Authorizations indicating that the questionable services were not performed, but instead other activities were conducted. Except as discussed below, USAC does not question the eligibility of the added activities and accepts the signed Change Authorizations as a resolution.
4. With respect to Item 12, this task includes ineligible firewall software, as well as components that appear to be eligible. IBM did not provide a cost allocation for this ineligible software, but USAC has conducted a cost allocation based on the information available.
5. With respect to Item 17, in response to USAC's request that IBM provide cost allocation information, IBM reserving its right to appeal the underlying eligibility question submitted a cost allocation for this task.¹⁷

Eligibility Determinations and Cost Allocation Analysis

IBM identifies the hardware and software costs as totaling \$492,270.20 and the labor costs as totaling \$3,095,536.08 for this FRN. This cost allocation is based on the labor costs distributed across 47 individual tasks. IBM has weighted each of the 47 tasks equally: "[s]ince the level of detail on individual tasks is limited, we have opted to use a 'per description (task)' cost allocation of the type frequently used by USAC in PIA initial

¹⁷ IBM indicates that the task originally indicated in the Statement of Work was eliminated, but also indicates that a similar task was added and performed. To aid discussion and due to these similarities, this analysis does not distinguish between the subtracted and added tasks in this instance.

reviews.”¹⁸ Dividing the labor cost by 47 individual tasks provides a cost per task of \$65,862.47 attributable to each task, which at a 90% applicant discount is equivalent to \$59,276.22 post-discount.

USAC accepts the cost allocation methodology employed by IBM in this case. USAC’s June 19, 2006 letter stated “[u]nder the circumstances present here, if we receive information that each of the approximately 44 components to the funding request involved about the same level of effort, then the funding request could be cost allocated so that recovery would be sought for 15/44 of the funds disbursed.” IBM has not provided information establishing that each component involved about the same level of effort. However, USAC understands IBM’s use of this methodology to be an implicit statement to this effect. USAC’s acceptance of IBM’s approach is limited to the circumstances in this FRN. USAC sees no information in the record that would contradict the assumptions underlying a cost allocation approach based on equal weighting of the tasks indicated in the Statement of Work.

Items 1-3

Items 1-3 of the Statement of Work are: “Develop distributed email architecture”; “Specify email server sizing & configuration”; and “perform planning and assessment for email deployment.” IBM posits that these are eligible “design and engineering” services. The ESL applicable to this time period has no entry for “design and engineering.”¹⁹ Instead, the relevant entries indicate that on-site technical support is conditionally eligible, but that consulting services are not eligible.²⁰ Eligible technical support generally involves the services directly necessary for a technology to be put into place. The services are closely tied to actual installation and configuration. Ineligible consulting services are associated with the pre-planning activities that involve fundamental decisions about the technology to be employed, such as the network architecture to be used and the specific products to be deployed. Clearly “architecture” of a technology deployment as well as “sizing & configuration” of the equipment must be defined prior to the applicant’s submission of their FCC Form 471. An applicant would not be able to make a responsible selection in response to the bids submitted, or provide reliable information required on the FCC Form 471, without such detail. Even if planning activities take place after submission of the FCC Form 471, those activities that involve a determination of the technology to be deployed rather than installation and configuration of technology are ineligible consulting services. Planning services that are

¹⁸ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, re: E-mail FRN at 4, August 16, 2006.

¹⁹ Later Eligible Services Lists included this term, and indicated that such services could be eligible if they were provided at the same time as installation. Such services are distinguishable from consulting services as described in the body of this document.

²⁰ See Schools and Libraries, Eligible Services List at 22, 31 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

a part of the normal Schools and Libraries program competitive bidding process are not eligible for funding, as are similar activities that occur within the relevant funding year.

Therefore, USAC has determined activities in the Statement of Work that involve installation and configuration services are eligible for funding, but activities in the Statement of Work that involve a determination of the technology to be deployed are not eligible. Determining the technology to be employed is appropriately characterized as consulting activities, which are ineligible under the applicable ESL.²¹

With this background, each of the three task descriptions at issue are evaluated as follows:

- “Specify email server sizing and configuration” was provided as part of IBM’s Statement of Work to the applicant. The Item 21 Attachment to the FCC Form 471 indicated the specific equipment to be provided. Consequently, the work of specifying the e-mail server sizing and configuration was done prior to the submission of El Paso ISD’s FCC Form 471 for Funding Year 2001 and prior to the start of Funding Year 2001 and therefore is not eligible for funding.
- Similarly, “Develop distributed email architecture” is a necessary component of the procurement activity. Applicants are required to evaluate competing bids,²² and in exercising this responsibility must understand the services to be provided from bidders. Because the activity involves “development” of architecture, rather than implementation, it also falls within an ineligible planning activity that occurred prior to the submission of El Paso ISD’s FCC Form 471 for Funding Year 2001 and prior to the start of Funding Year 2001 and therefore is not eligible for funding.
- Finally, evaluating the task to “perform planning and assessment for email deployment,” the terminology employed—“planning” and “assessment”—raises eligibility questions similar to those indicated above. However, IBM indicates that these activities included migration of old e-mail accounts to the new system, which would be an eligible activity. USAC concludes that the “planning and assessment for email deployment” includes eligible items.

Considering all three of the above activities, and conceding that the last activity could contain some eligible services, USAC concludes that a total of two line items above are not eligible because they provide ineligible consulting services rather than eligible configuration and installation services.

²¹ See Schools and Libraries, Eligible Services List at 31, 37 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

²² See 47 C.F.R. §§ 54.504(a), 54.511(a) (2000).

This conclusion has been reached based on the information available. IBM and El Paso ISD have asserted that the activities were eligible, but these assertions are at odds with the guidelines set forth in the Funding Year 2001 Eligible Services List.²³ Furthermore, IBM ~~did not substantiate its position by providing records of the actual services performed even though there has been ample opportunity for such records to be provided.~~ Therefore, USAC has determined that \$118,552.44 (\$59,276.22 * 2 = \$118,552.44) must be recovered for the line items that include ineligible consulting services.

Item 12

Item 12 of the Statement of Work is: "Install & configure IBM I servers. (2) with free firewall software." Firewall software was not eligible for funding in Funding Year 2001, yet IBM failed to provide a response to USAC's conclusion that the provision, installation, and configuration of firewall software as indicated in the Statement of Work was not eligible.²⁴ Since IBM did not provide a cost allocation, USAC is calculating a cost allocation based on the information available.

The detailed specification of the products to be provided indicates that the line item involves four file servers. Consequently, two of the file servers indicated in this line item received the ineligible products. USAC recognizes that the cost attributable to the ineligible firewall products and related installation and configuration services may be only a part of the overall installation and configuration of the servers. In the absence of cost allocation information submitted by IBM, USAC estimates these costs as 10% of the full installation and configuration tasks for the 50 percent of these servers that received the ineligible software. Thus, USAC's determination of the proportion of cost attributable to the ineligible software (including its installation and configuration) is \$3,293.12. ($\$59,276.22 * 10\% * 50\% = \$2,963.81$).

Item 17

Item 17 of the Statement of Work is "We will provide and install three Domino applications as pilots..." USAC has been informed that IBM bid Lotus Notes for the e-mail project but according to the information submitted, EPISD decided it did not meet their needs. Subsequently, the Domino servers were used with three e-mail programs to evaluate which e-mail solution was best for EPISD. IBM argues that "[t]he IBM service delivery team believed this to be an eligible activity because IBM was assisting EPISD in what amounted to a service substitution."²⁵ USAC rejects this eligibility argument and finds that the activities described clearly fall within ineligible consulting that has never

²³ See Schools and Libraries, Eligible Services List at 31, 37 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

²⁴ IBM states that Change Authorization #9 eliminated this task. However, while the Change Authorization removed sections 2.5 and 2.6 from the Statement of Work, the free firewall software was indicated in section 2.3.

²⁵ *Id.*

been eligible for funding.²⁶ The \$65,862.47 pre-discount figure submitted by IBM will be accepted as the appropriate amount for cost allocation of this activity and each of the 47 individual tasks in the Statement of Work. At the 90% discount level, this figure is equivalent to \$59,276.22.

Total Recovery Amount for FRN 648646: Totalling the cost of all ineligible items, the amount committed for ineligible items for this FRN is \$181,121.78 (\$59,276.22 + \$118,552.44 + \$2,963.81 = \$180,792.47). USAC has adjusted the funding commitment for this FRN and will seek recovery of this amount from IBM via the Commitment Adjustment (COMAD) Letter process.

Video Funding Request -- FRN 648729

USAC committed \$3,902,493.60 for this FRN and disbursed \$3,324,008.12 to IBM. USAC raised two questions related to this FRN: (1) Why the associated costs such as equipment component and labor costs did not decrease when the number of sites originally funded 90 – was decreased to 53, and (2) Whether ineligible products and services were provided.²⁷ With respect to the number of sites funded, IBM responded that the cost of the equipment was decreased by \$641,762, but that the associated costs for installation and configuration services did not decrease.²⁸ With respect to whether ineligible services were provided, USAC has reviewed IBM's responses and has determined that it appears no ineligible services were actually provided.

However, with respect to the amount disbursed for both products and services provided to the reduced number of sites, USAC finds that there should have been a corresponding decrease in associated costs when the number of sites decreased from 90 to 53, even though IBM has indicated that there was no decrease for the services performed. In response to USAC's request that IBM provide cost allocation information,

²⁶ IBM's August 16, 2006 letter describes the work conducted as follows:

As work was commencing, EPISD changed its mind about Lotus Notes and decided it did not meet its needs. EPISD also did not have a specific replacement email package in mind. EPISD asked IBM to assist with selection of a substitute email package, which the service delivery team did, believing such activity to be eligible under E-Rate.

The work done to assist EPISD with this email substitution was to load Domino, as the operating system, and then load the substitution candidates on the server for EPISD to test and evaluate....

In addition, IBM authored a document comparing the three email substitution candidates' pros and cons and provided it as a deliverable and assisted on an as needed basis with the evaluation. Parts of this activity stretched across several weeks....

This description clearly indicates a substantial consulting activity involved with assisting the applicant with a determination of the technology to be deployed. Such a consulting activity is not eligible for E-rate funds.

²⁷ See September 16, 2004 Letter at 2; Eligibility Analysis (attachment to letter) at 4-5.

²⁸ See Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Phil Gieseler, Eligible Service Manager, Schools and Libraries Division, USAC, August 17, 2005.

IBM – reserving its right to appeal the underlying substantive question – submitted a cost allocation indicating an excess disbursement of \$68,359.00.²⁹

Cost Allocation Analysis

USAC concludes that a greater reduction than proposed by IBM is appropriate based on the circumstances of this case. IBM indicates that a reduction in sites does not necessarily call for the same proportionate reduction in the costs of services provided—i.e., some services are required regardless of the number of sites. USAC can accept this general proposition, but, as shown in the table below, finds the specific implementation of this concept by IBM in some cases is not a realistic portrayal of costs that would be unaffected by a decrease in scope.

IBM provided a list of 14 installation and configuration tasks, and assigned percentage figures that represent the level of effort involved for each. IBM indicates that five of the tasks were “infrastructure-related,” and “essentially did not vary based on the number of video sites.” IBM indicates that these five tasks account for 50% of the level of effort. These five tasks, and USAC’s analysis of IBM’s position, are as follows:

Tasks that IBM indicates would not change in scope with a decrease in the number of sites	
FRN Task	USAC Response
1. “All units shipped at the same time from SUBCONTRACTOR will also be tested as a system, if proper documentation has been provided to SUBCONTRACTOR from the customer.” (10%)	Testing of a smaller number of components is smaller in scope than testing of a larger number of components.
2. “Test the product with its connected peripherals as part of the system (System Level Acceptance Test and Product Level Field Acceptance Test) as installations occur. If the IBM customer provided network, IBM customer provided peripherals or IBM customer provided wiring prevents the system from passing, the testing will be completed without the IBM customer provided	Testing of a smaller number of components is smaller in scope than testing of a larger number of components.

²⁹ See Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, Re: Video FRN, August 16, 2006.

components." (20%)	
3. "Inform the IBM Project Manager that the IBM customer's network is suspected to be the reason for the system not passing. SUBCONTRACTOR will make the IBM Project Manager aware of this fact as soon as it is aware of the issue so that the problems may be resolved. If network issues remain unresolved at the end of the installation schedule, SUBCONTRACTOR will provide product level testing information to the IBM Project Manager at the system sign-off meeting." (5%)	USAC agrees that this task could involve the same level of effort even with the reduction in scope from 90 sites to 53 sites.
4. "Provide system level testing (System Level Acceptance Test) information to the IBM Project Manager." (5%)	Development of information regarding configurations at 53 sites is smaller in scope than such services involved with 90 sites.
5. "Provide the customer with a basic system orientation." (10%)	USAC agrees that this task could involve the same level of effort even with the reduction in scope from 90 sites to 53 sites.

USAC therefore rejects the contention that the costs attributable to three of the tasks would be unchanged with a significant decrease in scope, but accepts IBM's explanation in two cases. According to IBM's information, these two tasks contribute 15% of the original project cost. Therefore, USAC accepts that 15% of the original project cost is attributable to tasks that would not vary with project scope. This leaves 85% of the project that would be affected by project scope. For the portion that would be affected by project scope, IBM uses a factor of 41%, attributable to the number of reduced sites ($90 - 53 = 37$) divided by the original number of sites (90). USAC agrees that this is an appropriate factor for cost allocation.

In addition, IBM indicates that an additional 10% should be recognized as overall project management and design and engineering that "would not have been reduced by a reduction in the number of sites." However, it is mathematically improper to apportion 100% of activities to fourteen tasks, as IBM has done, and then to claim an additional 10% on top of this. Therefore, USAC rejects this factor.

Thus USAC's determination of the labor costs that would remain static regardless of decreased project scope is 15%. The remaining 85% of labor costs can be considered to move proportionately with the scope of the project. The overall project can be divided into three components: (1) Hardware costs; (2) Services for costs not affected by the decreased scope; and (3) Services for costs that are affected by the decreased scope.

IBM has indicated that the hardware cost of the project was originally estimated at \$1,903,053, and this cost was reduced by \$641,762 due to the decreased scope, for a revised hardware total of \$1,261,291 pre-discount, or \$1,135,161.90 post-discount. This reduction of $\$641,762 / \$1,903,053 = 34\%$ tracks roughly with the reduction in project scope of 41% and is accepted by USAC, considering IBM's contention that some centralized hardware would not be eliminated due to the decreased scope.

IBM also indicates that the labor part of the contract was \$2,471,001, which corresponds to a figure of \$2,223,900.90 post-discount at the 90% discount level. Based on USAC's analysis as described above, 15% of this amount can be considered as a fixed cost regardless of the decrease in scope, and the remaining 85% can be considered to move proportionately with the decreased scope. Therefore, the amount attributable to the fixed cost of labor is $\$2,223,900.90 * 15\% = \$333,585.14$.

The proportion of labor costs that are found to vary with the decrease in scope is $\$2,223,900.90 * 85\% = \$1,890,315.76$. With a decrease in project scope from 90 to 53 sites, the costs appropriate for this part of the project are $53/90 * \$1,890,315.76 = \$1,113,185.95$.

Adding these three separate cost components provides a total post-discount cost of $(\$1,135,161.90 + \$333,585.14 + \$1,113,185.95) = \$2,581,932.99$. No more than this dollar amount should have been disbursed by USAC. However, USAC was invoiced and disbursed \$3,324,008.12. Thus $\$3,324,008.12 - \$2,581,932.99 = \$742,075.13$ is the amount of excessive USAC disbursement.

Total Recovery Amount for FRN 648729: USAC will therefore seek recovery of \$742,075.13 from IBM via the Recovery of Improperly Disbursed Funds (RIDF) Letter process.

Web and File Server Funding Request – FRN 648960

USAC funded \$5,850,540 for this FRN and disbursed \$3,374,300 to IBM. USAC requested information about the specific uses of the servers from El Paso ISD in order to determine whether the servers are being used only for eligible purposes. El Paso ISD initially responded that the file servers are used for "web-based access to email and to a file server."³⁰ This response did not provide the information USAC needs to determine whether the file servers are being used only for eligible purposes, and so USAC provided El Paso ISD with an additional opportunity to respond.

³⁰ Letter from Terri Jordan, Executive Director, Technology and Information Systems, El Paso ISD, to Philip Gieseler, Schools and Libraries Division, USAC, August 19, 2005 at 3.

El Paso ISD states that two servers each were installed at 52 sites, for a total of 104 servers.³¹ El Paso ISD further states that although \$5,850,540 was funded for this FRN, they acquired fewer servers than were funded.³² One server at each site was configured as an e-mail server, which the Funding Year 2001 Eligible Services List³³ indicates is eligible for funding. The other server at each site was configured for two purposes – as an authentication server and for “supplementary student file storage.”

USAC concludes the authentication server is eligible for funding in this case. An authentication server provides a login function for network users, by confirming that a user name and password is valid. The Funding Year 2001 Eligible Services List did not specifically indicate that an authentication server is eligible for funding, but USAC concludes that the description provided by the applicant fits is consistent with general eligibility requirements for internal connections.³⁴ As configured, the authentication servers were “an essential element in the transmission of information,” since users must login to the network for transmission to take place.³⁵ However, USAC concludes that the storage of non-e-mail end user files was not eligible under the Funding Year 2001 Eligible Services List.³⁶

Cost Allocation Analysis

Recognizing that eligibility of the student file storage is “subject to dispute,” El Paso ISD submitted a proposed cost allocation based on subtracting the cost of some of the hard disk drives included with the authentication file servers.³⁷ USAC has evaluated the cost allocation and has concluded that it does not meet the necessary standard of being based on “tangible information that provides a realistic result” for the following reasons:

- The file servers consist of many components beyond the hard drives, such as memory modules, central processing unit, case, and cooling fans. All components of the file servers are being used in part for ineligible capability – not just the hard drives.
- Subtraction of hardware cost only is not appropriate because a substantial amount of the FRN cost was for installation and configuration of the file servers.

³¹ Letter from Louis Mona, Interim Executive Director, Technology and Information Systems, El Paso ISD, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, August 19, 2006 at 3 (*El Paso 2006 Letter*).

³² *El Paso 2006 Letter* at 2.

³³ See Schools and Libraries, Eligible Services List at 27 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

³⁴ See Schools and Libraries, Eligible Services List at 21, 26 available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

³⁵ *Universal Service Order*, 12 FCC Rcd at 9021.

³⁶ See Schools and Libraries, Eligible Services List at 26 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

³⁷ *El Paso 2006 Letter* at 3-4.

- As an ancillary point, El Paso ISD claims that the hard drive costs are based on January 2002 information, yet it is not clear that the supporting information submitted represents costs during that time period. Actual costs at time of procurement would be higher than current costs.

Therefore USAC has utilized a cost allocation approach that is documented on the USAC website as applicable to file servers, as follows:

Half of the 104 file servers are being used in two ways, one of which is considered eligible and one of which is clearly not eligible. For these partially eligible servers, an acceptable cost allocation is to simply consider the number of eligible uses in comparison to the total number of uses, that is (one eligible use) divided by (two total uses) equals fifty percent eligibility. The full cost allocation for the entire funding request is therefore as follows:

Half of the 104 file servers are fully eligible.
Half of the 104 file servers are 50% eligible.
Therefore, the entire funding request is 75% eligible.
The remaining 25% of the funding request is not eligible.

The amount disbursed by USAC for the 104 file servers, including their installation and configuration was \$3,374,300.00. Since under the cost allocation, 25% of this amount is not eligible, the amount to recover is: $\$3,374,300.00 \times 25\% = \$843,575.00$.

Total Recovery Amount for FRN 648960: USAC funded and disbursed \$843,575.00 for ineligible items. USAC has adjusted the funding commitment and will seek recovery of this amount from both El Paso ISD and IBM because they each share responsibility for the ineligible use. Specifically, El Paso ISD used a portion of the servers for an ineligible use, and IBM was responsible for configuring the servers to allow for the ineligible use.

Maintenance Services Funding Request – FRN 648793

USAC funded \$24,409,530 for this FRN and disbursed the full amount funded to IBM. USAC questioned whether the FRN included substantial ineligible items.³⁸ IBM disagrees that this FRN includes any ineligible items and argues that at the time this FRN was funded, the goods and services were eligible for funding in their entirety.³⁹

At the United States House Committee on Energy and Commerce, Oversight and Investigations Subcommittee hearing held on September 22, 2004 entitled "Problems

³⁸ See September 16, 2004 Letter at 2; Eligibility Analysis (attached) at 5-6.

³⁹ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to George McDonald, Vice President, Schools and Libraries Division, USAC, March 25, 2005.

with the E-rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of our Nation's Schools to the Internet," IBM testified that services outside of eligible basic maintenance were provided as a part of this funding request.⁴⁰ IBM further testified that services were provided for only two and one half months before the end of the last day to receive service for this FRN.⁴¹

In the Universal Service Order, the Commission held that support can be provided for "basic maintenance services" that are "necessary to the operation of the internal connections network."⁴² In the *Ysleta Order*, which was released subsequent to the FRNs at issue here, the Commission directed USAC to ensure that it complied with this holding when it reviewed subsequent funding requests:

When SLD reviews the applications that are submitted after the rebidding occurs, it should ensure that discounts are provided only for "basic maintenance" and not for technical support that falls outside the scope of that deemed eligible in the Universal Service Order." (emphasis added).⁴³

The Commission clarified in the *Schools and Libraries Third Order* that helpdesks that provide a comprehensive level of support beyond basic maintenance of only eligible components are ineligible for funding.⁴⁴ While the *Ysleta Order* and the *Schools and Libraries Third Order* were released by the FCC subsequent to the funding requests at issue here, in these orders the Commission clarified and reaffirmed the essential holding in the original *Universal Service Order*.

USAC has determined, consistent with the *Universal Service Order*, that this FRN included substantial ineligible items. The details related to this FRN indicate that in order to provide the services, IBM created an extensive facility for maintenance support. For example, information submitted to the House Oversight Committee indicates that up to \$16 million of the funding request was used for developing the infrastructure and tools as opposed to the delivery of actual, eligible support services.⁴⁵ The ineligible items are those which were used to create the facility and which are not eligible in themselves. While basic maintenance services of eligible components are eligible, the creation of an extensive support structure for the delivery of those services is not eligible. Services well

⁴⁰ Problems with the E-rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of our Nation's Schools to the Internet Part 3: Hearing before the Subcomm. On Oversight and Investigations of the House Comm. On Energy and Commerce, 108th Cong., pp. 260-262 (2004) (*Hearing Record*).

⁴¹ *Hearing Record*, p. 261.

²⁰ *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8784-85, ¶ 460 (1997).

⁴³ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al. Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Rcd 6858 ¶ 64 (2003).

⁴⁴ *Schools and Libraries Third Order* ¶ 24.

⁴⁵ *Hearing Record*, pp. 260-262, 563-564.

beyond a basic level were provided, as evidenced of cost per site in excess of half a million dollars. USAC has provided ample opportunity for IBM and El Paso ISD to submit specific information in support of their position that only eligible services were provided. However, neither IBM nor El Paso ISD have provided documentation – such as records of the actual services provided – to support their arguments that only eligible services were provided. Additionally, although USAC disbursed the full amount committed for this FRN, IBM states that services were provided for only five and a half months.⁴⁶

Cost Allocation Analysis

In response to USAC's request that IBM provide cost allocation information, IBM – reserving its right to appeal the underlying substantive questions – submitted a cost allocation indicating that consistent with USAC's stated eligibility determinations, \$5,692,208.64 was disbursed by USAC for ineligible items.⁴⁷ USAC has evaluated the cost allocation and has concluded that it does not meet the necessary standard of being based on "tangible information that provides a realistic result" because as explained in greater detail below, some of the assumptions underlying the cost allocation are contrary to information available in this case.

The cost allocation submitted by IBM is based on separating the project into three equally-weighted parts of \$9,040,566.67 (pre-discount): actual repairs, initial setup, and overall project management, with a cost allocation for each of these three parts as follows:

Actual repairs: IBM considers the portion for actual repairs to be 100% eligible.
Initial setup: IBM has further divided this category into nine sections, and has assigned a level of eligibility to each of these nine, from 0% eligible to 100% eligible. IBM has calculated that the resulting

⁴⁶ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, Re Maintenance FRN, August 17, 2006.

⁴⁷ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, August 17, 2006, Attachment #1.

⁴⁸ The breakdown indicated by IBM for initial setup of the overall project is as follows:

Task Description	Task Price	Eligible %	Ineligible \$
Network maintenance system design	\$1,004,507.41	25%	\$753,380.56
Detailed implementation design & test environment installation	\$1,004,507.41	0%	\$1,004,507.41
Deployment of network maintenance framework	\$1,004,507.41	25%	\$753,380.56
Deployment of Server and Network Monitoring	\$1,004,507.41	50%	\$502,253.70
Inventory	\$1,004,507.41	100%	\$0
Maintenance event consolidation and automation	\$1,004,507.41	50%	\$502,253.70
Help desk problem + change maintenance function	\$1,004,507.41	25%	\$753,380.56
User administration	\$1,004,507.41	100%	\$0

ineligible cost from this section is \$4,269,156.49. ⁴⁸
Project management: IBM indicates that it has allocated overall project management "in the same proportion as the ineligible portion" of the initial setup costs. However, due to a mathematical error, IBM incorrectly concludes that the resulting ineligible cost is \$1,423,052.16, whereas the actual ineligible cost for project management using their methodology would be \$2,134,578.24. ⁴⁹

In total, once the mathematical error is corrected, the IBM methodology indicates that \$6,403,734.73 (pre-discount) would be cost allocated from the FRN. (\$4,269,156.49 + \$2,134,578.24 = \$6,403,734.73). On a post-discount basis, the recovery amount under this formulation would be \$6,403,734.73 * 90% discount rate = \$5,763,361.26, which is 23.6% of the disbursed amount of \$24,409,530.00.

Cost Allocation Analysis

In determining whether the IBM methodology is consistent with the standard of "tangible information that provides a realistic result," USAC has considered whether the cost allocation framework proposed is acceptable. In particular, USAC has evaluated whether the approach of dividing the full project into three equally-weighted components is valid. USAC's June 19, 2006 letter specifically indicated the acceptability of such an approach if each of the "components to the funding request involved about the same level of effort." In other cases, USAC indicated that an appropriate approach would "include weighting for the level of effort utilized for each of the component parts."

In this case, the information available indicates that an equal weighting of the categories identified by IBM is inconsistent with the actual proportion of eligible and ineligible services rendered for the following reasons. First, ~~IBM concedes that actual repair services during the fifteen-month period from July 1, 2001 through September 30, 2002 were performed for only the last 5 and a half months of this period of time.~~ The date of USAC's Funding Commitment Decision Letter was September 28, 2001, and so it is reasonable to expect that the funding commitment should be used for maintenance services over 12 months. If service was only provided for a lesser time period, then the

Remote control	\$1,004,507.41	100%	\$0
The amount shown by IBM as ineligible initial setup is 47% of all expenses categorized as initial setup.			

⁴⁹ IBM indicates that the project management category is allocated in the same proportion as "the ineligible portion...of the 'Technical Support Office Initial Setup.'" The ineligible portion of the Technical Support Office Initial Setup is \$4,269,156.49, as shown in the previous footnote. However, IBM appears to have incorrectly included the one-third cost of the project management category (\$9,040,566.67) in the calculation of these very project management costs, which is mathematically incorrect. IBM's calculation appears to be \$4,269,156.49 divided by (\$9,040,566.67 + \$9,040,566.67 + \$9,040,566.67) whereas a more accurate calculation would be \$4,269,156.49 divided by (\$9,040,566.67 + \$9,040,566.67). This latter calculation, which comes to 23.6%, is used to develop the corrected ineligible portion of project management expenses according to the IBM formulation of \$2,134,578.24. (The total project management portion of \$9,040,566.67 times the ineligible factor of 23.6% equals \$2,134,578.24.)

full cost of the FRN should not have been disbursed. Therefore, the methodology used by IBM cannot be accepted because the proportion of time that actual maintenance services were not provided ($6.5 \text{ divided by } 12 = 54\%$), is much larger than the 23.6% figure that comes from IBM's cost allocation methodology.

Second, the record before the House Committee indicates that approximately \$16 million of the funding request was used for "tools" as opposed to actual support services.⁵⁰ The information available indicates that a significant portion of the funding request was used to create the support facility, rather than implement actual repair services. Consequently, the information available does not support a cost allocation approach that is based on only a portion of one third of the funding request being attributed to the substantial and ineligible original creation of a support structure. This conclusion is reinforced by clear descriptions in the Statement of Work that ineligible services were to be included. Since the \$16 million figure is 59% of the full funding request, which is much larger than the 23.6% figure that comes from IBM's corrected cost allocation figures, IBM's methodology cannot be accepted.

Third, IBM assigns a project management expense that is one-third of the entire project, and equal to the expense for repair costs. Under appropriate project management techniques and reasonable standards for good business practices, it is not reasonable to assign a project management expense for maintenance services that is equal to the costs of the actual repairs. Furthermore, IBM has provided no specific information that would support their assumption of one third of the full cost being attributable to project management.

For these reasons, USAC rejects IBM's cost allocation because the information available does not support equal weighting of project management, repair costs, and technical support office initial setup.⁵¹

In making this determination, USAC emphasizes that IBM has failed to provide specific information about the personnel involved for various parts of the project, the non-personnel costs, or other information that would substantiate the amount of actual support service costs in comparison to the ineligible costs expended in order to reach a capability for providing those support services. IBM has provided eligibility arguments, but has failed to provide specific information about the extent and type of services actually delivered.

When a cost allocation to subtract ineligible components is not available, USAC generally seeks recovery of the full disbursed amount. However, because IBM has

⁵⁰ Hearing Record, pp. 260-262, 563-564.

⁵¹ Because USAC finds that this equally-weighted approach cannot be accepted, USAC does not reach an analysis of IBM's breakdown of initial setup expenses as 53% eligible and 47% ineligible, but notes that such an analysis, if conducted, might reach different results than that indicated by IBM.

provided some information, USAC will formulate a cost allocation based on the information provided.

USAC's cost allocation first considers the limited period of time that repair services were actually utilized – ~~5 and a half months out of the 12 months for which~~ funds were disbursed. This corresponds to a factor of 46% (5.5 divided by 12), that is applicable for the time period eligible services were provided. Additionally, the record establishes that ineligible support services – such as ineligible end user support and ineligible network monitoring and management – were provided. However, neither IBM nor El Paso ISD provided specific details to establish the proportion of these ineligible services to any eligible services.

USAC has evaluated the January 18, 2001 contract for maintenance services to provide a basis for a cost allocation for the maintenance services provided. Absent specific information provided by IBM, and because no contrary information has been provided by IBM, USAC will use a basic cost allocation approach that identifies the total number of tasks, and classifies the tasks that are not eligible or only partially eligible.

The documentation provided to USAC consists of an Executive Overview, a Statement of Work (labeled Section 2), and appendices, with the descriptions of specific tasks performed in the Statement of Work section. Section 2.3 describes the activities of the Maintenance Support Office, with additional subsections as follows:

- 2.3.1 Maintenance Project Coordination
- 2.3.2 Call-in Dispatch/Technical Maintenance Support
- 2.3.3 Systems Maintenance Function Implementation

Subsection 2.3.2 provides a listing of 17 separate tasks, and provides the principal basis for a cost allocation.⁵² In addition, subsection 2.3.3 outlines certain implementation activities that also identify ineligible features.

The 17 tasks identified in subsection 2.3.2, and USAC's determination of ineligible activities, is provided in the table below. USAC's determination of partial or full ineligibility is limited to circumstances in which the determination is clear.

<u>Statement of Work Task</u>	<u>USAC Comment</u>
1. Take incoming calls from El Paso ISD users	Some calls were for ineligible end user support—partially ineligible

⁵² The opening narrative for Section 2.3 also provides a listing of the work to be performed. However, since this listing appears duplicative in many respects to the information in subsection 2.3.2 it is not separately evaluated.

2. Learn/understand/support El Paso ISD hardware and operational configurations	
3. Serve as initial point of contact for support, maintenance and problem resolution	Some contacts were for ineligible end user support—partially ineligible
4. Provide systems support for servers, switches, routers, and other network components	
5. Provide “ownership to resolution” of all network problem calls, monitor and report on the progress of problem resolution (through the monthly MSO activity report), confirm resolution of the problem with the end user, and log final resolution via the maintenance tool.	
6. Prioritize problem resolution in accordance with documentation developed by IBM and agreed to by El Paso ISD	
7. Provide system status messages as requested	
8. Provide web maintenance support	
9. Monitor problem status to facilitate problem closure	
10. Provide problem diagnosis and levels one/dispatch call-in support, level two/advanced network maintenance support, and level three/advanced network maintenance support technical support	
11. Coordinate problem resolution with escalation to appropriate skill level technical resources toward problem resolution goals	
12. Maintain documentation of problem and ‘own’ problem resolution for in-scope activities, defined as: <ul style="list-style-type: none"> • Netfinity servers (number to be stipulated) • RS 6000 servers (to be stipulated) • Workstation support related to the network (approximately 10,000 workstations) • Networking hardware and configuration support (Disco networking equipment located in up to 90 buildings) • Dial-up/direct connections to the Internet • Network connectivity between buildings 	Workstation support is not eligible—partially ineligible
13. Perform appropriate ‘hand-off’ of out-of-scope work functions (i.e. PC workstation warranty work)	No PC workstation work is eligible—not eligible
14. Report out of scope activities to project office for proactive interaction with El Paso ISD resources to minimize future occurrences	Some reporting was for PC workstation work—partially ineligible
15. Assist in the resolution of in-scope functions via telephone	

support or on-site network related support through problem resolution	
16. Dispatch dedicatee maintenance field technical resources and track activities through network problem resolution	
17. Dispatch and manage extended field technical network resources and track activities through network problem resolution	

Based on the information available, USAC has determined that four of the tasks are partially ineligible, and one task to be fully ineligible. USAC considers the remaining tasks to be eligible based on the information available at this time. Counting every determination of "partially ineligible" as a finding at the level of 50% ineligible, or 17.6% (3 divided by 17), of the tasks are not eligible.

In addition, subsection 2.3.3 describes the features implemented as part of the overall maintenance design. Additional subcategories, and USAC's evaluation of each of them, are provided in the table below.⁵³

<u>Task</u>	<u>Comment</u>
2.3.3.1 Network Maintenance Systems Design	
2.3.3.2 Detailed Implementation Design and Test Environment Installation	
2.3.3.3 Deployment of Network Maintenance Framework	
2.3.3.4 Deployment of Server and Network Monitoring	Network monitoring is fully ineligible ⁵⁴
2.3.3.5 Inventory	
2.3.3.6 Maintenance Event Consolidation & Automation	
2.3.3.7 Help Desk Problem and Change Maintenance Function	
2.3.3.8 User Administration	

⁵³ Lack of USAC comment for this table and the previous table are not to be interpreted as an indication that USAC has necessarily determined that the item has been found to be eligible. In some cases, such as subsection 2.3.3.1, the network architecture design function has been found to be not eligible, but is discussed and cost allocated separately from this part of the analysis.

⁵⁴ See Schools and Libraries, Eligible Services List at 22 (January 24, 2001) available at http://www.usac.org/sl/tools/search_tools/eligible-services-list-archived-versions.aspx.

2.3.3.9 Remote Control	
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Using the same approach as indicated for the previous table, the ineligible network monitoring would account for 11.1% (1 divided by 9), of the work.

Adding the two areas of ineligible support services provides a finding of 28.7% ineligible (17.6% + 11.1% = 28.7%).

Total Recovery Amount for FRN 648793: USAC concludes that the disbursed amount of \$24,409,530.00 should be pro-rated for the amount of time services were delivered totaling \$11,228,383.80 ($\$24,409,530.00 \times 5.5 = \$11,228,383.80$). The ineligible support services would occur over the entire period of time because there is no indication in the record that these services were delivered at the beginning of the service delivery period and therefore require cost allocation for the amount of \$3,222,546.15 ($\$11,228,383.80 \times 28.7\% = \$3,222,546.15$). Thus, the total amount of recovery is \$16,402,072.35 ($\$24,409,530 \times 54\% + \$3,222,546.15 = \$16,402,072.35$).

Schools and Libraries Division
Universal Service Administrative Company

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Exhibit 2

Notification of Improperly Disbursed Funds Letter
Funding Year 2001: 7/01/2001 - 6/30/2002

September 25, 2007

Christine Hill
International Business Machines Corporation
3039 Cornwallis Road, Building 203
Research Triangle Park, NC 27709

Re: SPIN: 143005607
Form 471 Application Number: 256606
Funding Year: 2001
FCC Registration Number: 0011588688
Applicant Name: EL PASO INDEP SCHOOL DISTRICT
Billed Entity Number: 142118
Applicant Contact Person: Jack S. Johnston

Our routine review of Schools and Libraries Program funding commitments has revealed certain applications where funds were disbursed in violation of program rules.

In order to be sure that no funds are used in violation of program rules, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) must now recover these improper disbursements. The purpose of this letter is to inform you of the recoveries as required by program rules, and to give you an opportunity to appeal this decision. USAC has determined the service provider is responsible for all or some of the program rule violations. Therefore, the service provider is responsible to repay all or some of the funds disbursed in error.

This is NOT a bill. The next step in the recovery of improperly disbursed funds process is for SLD to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of the Demand Payment Letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." Please see the "Informational Notice to All Universal Service Fund Contributors, Beneficiaries, and Service Providers" at <http://www.universalservice.org/fund-administration/tools/latest-news.aspx#083104> for more information regarding the consequences of not paying the debt in a timely manner.

TO APPEAL THIS DECISION

If you wish to appeal the Notification of Improperly Disbursed Funds decision indicated in this letter, your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Improperly Disbursed Funds Letter and the Funding Request Numbers you are appealing. Your letter of appeal must also include the applicant name, the Form 471 Application Number, Billed Entity Number, and the FCC Registration Number from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Improperly Disbursed Funds Letter that is the subject of your appeal to allow the SLD to more readily understand your appeal and respond appropriately. Please keep your letter specific and brief, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal electronically, please send your appeal to appeals@sl.universalservice.org using the organization's e-mail. If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Dept. 125 - Correspondence Unit, 100 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC web site or by calling the Client Service Bureau at 1-888-203-8100. We strongly recommend that you use the electronic appeals option.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC web site or by calling the Client Service Bureau. We strongly recommend that you use the electronic filing options.

FUNDING DISBURSEMENT REPORT

On the pages following this letter, we have provided a Funding Disbursement Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from the application for which recovery is necessary. Immediately preceding the Report, you will find a guide that defines each line of the Report. The SLD is also sending this information to the applicant for informational purposes. If USAC has determined the applicant is also responsible for any rule violation on these Funding Request Numbers, a separate letter will be sent to the applicant detailing the necessary applicant action. The Report explains the exact amount the service provider is responsible for repaying.

Schools and Libraries Division
Universal Services Administrative Company

cc: Jack S. Johnston
EL PASO INDEP SCHOOL DISTRICT

A GUIDE TO THE FUNDING DISBURSEMENT REPORT

Attached to this letter will be a report for each funding request from the application cited at the top of this letter for which a Recovery of Improperly Disbursed Funds is required. We are providing the following definitions.

FUNDING REQUEST NUMBER (FRN): A Funding Request Number is assigned by the SLD to each individual request in a Form 471 once an application has been processed. This number is used to report to applicants and service providers the status of individual discount funding requests submitted on a Form 471.

CONTRACT NUMBER: The number of the contract between the applicant and the service provider. This will be present only if a contract number was provided on the Form 471.

SERVICES ORDERED: The type of service ordered by the applicant, as shown on Form 471.

BILLING ACCOUNT NUMBER: The account number that you established with the applicant for billing purposes. This will be present only if a Billing Account Number was provided on the Form 471.

FUNDING COMMITMENT: This represents the amount of funding that SLD had reserved to reimburse for the approved discounts for this service for this funding year.

FUNDS DISBURSED TO DATE: This represents the total funds that have been paid to you for this FRN as of the date of this letter.

FUNDS TO BE RECOVERED FROM SERVICE PROVIDER: This represents the amount of Improperly Funds Disbursed to Date for which the service provider has been determined to be primarily responsible. These improperly disbursed funds will have to be recovered from the service provider.

DISBURSED FUNDS RECOVERY EXPLANATION: This entry provides the reason the adjustment was made.

**Funding Disbursement Report
for Form 471 Application Number: 256606**

Funding Request Number:	648729
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Funding Commitment:	\$3,902,493.60
Funds Disbursed to Date:	\$3,324,008.12
Funds to be Recovered from Service Provider:	\$742,075.13

Disbursed Funds Recovery Explanation:

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter.

Notification of Commitment Adjustment Letter
Funding Year 2001: 7/01/2001 - 6/30/2002

September 25, 2007

Christine Hill
International Business Machines Corporation
3039 Cornwallis Road, Building 203
Research Triangle Park, NC 27709

Re: SPIN: 143005607
Form 471 Application Number: 256606
Funding Year: 2001
FCC Registration Number 0011588688
Applicant Name: EL PASO INDEP SCHOOL DISTRICT
Billed Entity Number: 142118
Applicant Contact Person: Jack S. Johnston

Our routine review of Schools and Libraries Program funding commitments has revealed certain applications where funds were committed in violation of program rules.

In order to be sure that no funds are used in violation of program rules, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) must now adjust the overall funding commitment. The purpose of this letter is to make the adjustments to the funding commitment required by program rules, and to give you an opportunity to appeal this decision. USAC has determined the service provider is responsible for all or some of the program rule violations. Therefore, the service provider is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for SLD to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of the Demand Payment Letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." Please see the "Informational Notice to All Universal Service Fund Contributors, Beneficiaries, and Service Providers" at <http://www.universalservice.org/fund-administration/tools/latest-news.aspx#083104> for more information regarding the consequences of not paying the debt in a timely manner.

TO APPEAL THIS DECISION:

If you wish to appeal the Commitment Adjustment Decision indicated in this letter, your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Numbers you are appealing. Your letter of appeal must include the Billed Entity Name, the Form 471 Application Number, Billed Entity Number, and the FCC Registration Number (FCC RN) from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow the SLD to more readily understand your appeal and respond appropriately. Please keep your letter specific and brief, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal electronically, please send your appeal to appeals@sl.universalservice.org using your organization's e-mail. If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Dept. 125- Correspondence Unit, 100 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC web site or by contacting the Client Service Bureau at 1-888-203-8100. We strongly recommend that you use the electronic appeals option.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket Nos. on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site, or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

FUNDING COMMITMENT ADJUSTMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from the application for which adjustments are necessary. Immediately preceding the Report, you will find a guide that defines each line of the Report.

The SLD is also sending this information to the applicant for informational purposes. If USAC has determined the applicant is also responsible for any rule violation on these Funding Request Numbers, a separate letter will be sent to the applicant detailing the necessary applicant action.

Please note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount. Please note the Funding Commitment Adjustment Explanation in the attached Report. It explains why the funding commitment is being reduced. Please ensure that any invoices that you or the applicant submit to USAC are consistent with program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds the Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the service provider is responsible for repaying.

Schools and Libraries Division
Universal Services Administrative Company

cc: Jack S. Johnston
EL PASO INDEP SCHOOL DISTRICT

A GUIDE TO THE FUNDING COMMITMENT ADJUSTMENT REPORT

Attached to this letter will be a report for each funding request from your application for which a commitment adjustment is required. We are providing the following definitions.

FUNDING REQUEST NUMBER (FRN): A Funding Request Number is assigned by the SLD to each individual request in your Form 471 once an application has been processed. This number is used to report to applicants and service providers the status of individual discount funding requests submitted on a Form 471.

CONTRACT NUMBER: The number of the contract between the applicant and the service provider. This will be present only if a contract number was provided on Form 471.

SERVICES ORDERED: The type of service ordered by applicant, as shown on Form 471.

BILLING ACCOUNT NUMBER: The account number that you have established with your customer for billing purposes. This will be present only if a Billing Account Number was provided on the Form 471.

ORIGINAL FUNDING COMMITMENT: This represents the original amount of funding that SLD had reserved to reimburse for the approved discounts for this service for this funding year.

COMMITMENT ADJUSTMENT AMOUNT: This represents the amount of funding that SLD has rescinded because of program rule violations.

ADJUSTED FUNDING COMMITMENT: This represents the adjusted total amount of funding that SLD has reserved to reimburse for the approved discounts for this service for this funding year. If this amount exceeds the Funds Disbursed to Date, the SLD will continue to process properly filed invoices up to the new commitment amount.

FUNDS DISBURSED TO DATE: This represents the total funds that have been disbursed for this FRN as of the date of this letter.

FUNDS TO BE RECOVERED FROM SERVICE PROVIDER: This represents the amount of improperly disbursed funds to date for which the service provider has been determined to be primarily responsible. These improperly disbursed funds will have to be recovered from the service provider.

FUNDING COMMITMENT ADJUSTMENT EXPLANATION: This entry provides an explanation of the reason the adjustment was made.

Funding Commitment Adjustment Report
Form 471 Application Number: 256606

Funding Request Number:	648646
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Original Funding Commitment:	\$3,229,025.65
Commitment Adjustment Amount:	\$180,792.47
Adjusted Funding Commitment:	\$3,048,233.18
Funds Disbursed to Date:	\$3,229,025.25
Funds to be Recovered from Service Provider:	\$180,792.47
Funding Commitment Adjustment Explanation:	

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**

Funding Request Number:	648758
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Original Funding Commitment:	\$2,457,027.90
Commitment Adjustment Amount:	\$1,279,631.59
Adjusted Funding Commitment:	\$1,177,396.31
Funds Disbursed to Date:	\$2,457,027.87
Funds to be Recovered from Service Provider:	\$1,279,631.59
Funding Commitment Adjustment Explanation:	

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**

Funding Request Number:	648793
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Original Funding Commitment:	\$24,409,530.00
Commitment Adjustment Amount:	\$16,402,072.35
Adjusted Funding Commitment:	\$8,007,457.65
Funds Disbursed to Date:	\$24,409,530.00
Funds to be Recovered from Service Provider:	\$16,402,072.35

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the service provider as per the attached Further Explanation Letter.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**

Funding Request Number:	648960
Contract Number:	RFP# 101-00
Services Ordered:	INTERNAL CONNECTIONS
Billing Account Number:	
Original Funding Commitment:	\$5,850,540.00
Commitment Adjustment Amount:	\$3,319,815.00
Adjusted Funding Commitment:	\$2,530,725.00
Funds Disbursed to Date:	\$3,374,300.63
Funds to be Recovered from Service Provider:	\$843,575.00
Funding Commitment Adjustment Explanation:	

After a thorough review, it was determined that this funding request will be rescinded in full and the USAC will see recovery of erroneously disbursed funds from the applicant and the service provider as per the attached Further Explanation Letter.

**PLEASE SEND A COPY OF THIS PAGE WITH YOUR
CHECK TO ENSURE TIMELY PROCESSING**

Exhibit 3

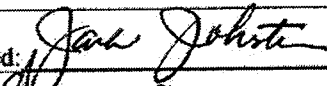
Service Certification

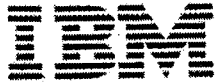
Service Provider Name	IBM Corporation
Service Provider SPIN	143005607
Service Provider Invoice #	2760274-09 (Video Services)
Undiscounted Invoice Amount	107,588.00
Discounted Invoice Amount	96,829.20

Applicant Name	El Paso Independent School District
Representative / Contact Name	Jack Johnston
Representative / Contact Title	Executive Director Technology & Information Systems
Representative / Contact Phone	915-779-4235
Billed Entity Number (BEN)	142118
471#	256606
FRN#	648729
Date Services Delivered and Installed	09/18/02

This is to certify that I am authorized to represent the above named applicant. This is also to certify the services described on the attached vendor invoice were delivered and installed.

Or The charges represented by the above represented invoice are deposits or up-front charges for services, which have not been delivered, and have been agreed to based on the contract between the above referenced Applicant and Service Provider.

Signed: 	Signed:
Date: <u>Sept 18, 2002</u>	Date:
Copy of <u>detailed</u> vendor invoice must be attached	Copy of <u>supporting contract</u> must be attached if indicated below Supporting Contract Required YES <input type="checkbox"/> NO <input type="checkbox"/>

IBM GLOBAL SERVICES
E-RATE INVOICE FOR SERVICES

Please remit payment to:
IBM Global Services US
Jody Ryan
4100 Rio Bravo, Suite 104
El Paso, TX 79902
303-773-5464

Invoice Number
C7CRK09

IBM Customer Number
2760274

Invoice Date
09/18/2002

Terms
DUE UPON RECEIPT

Invoice to:
El Paso Independent School District (EPISD)
6531 Boeing Drive
El Paso, TX 79925
915-779-4333

EPISD PO Number
234789

EPISDISD FRN Number
648729

IBM Contract Number
CFT6QSH

PROJECT Reference
VIDEO SERVICES

IBM Work Number
C7CRK

Comments
Please reference the IBM invoice number
and IBM Customer number on your check.

Vendor Number
21581

Page #
1 OF 1

Services provided August 2002 through September 2002.

Video Services Support.

Video Infrastructure Support.

Video systems and maintenance, including design, implementation and customization of video functions.

Technical resources for video support.

SUB TOTAL	\$213,588.00
CREDIT FOR NON ERATE VIDEO PERIPHERAL SOW	(\$106,000.00)
TOTAL	\$107,588.00

SLD PORTION DUE	\$96,829.20
-----------------	-------------

EPISD PORTION DUE	\$10,758.80
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IF NOT PAID BY OCTOBER 18, 2002, EPISD PLEASE PAY THIS AMOUNT	\$10,893.29
--	-------------

This invoice is issued pursuant to the IBM Customer Agreement or the equivalent agreement between us.

IBM SIGNATURE:

EPISD SIGNATURE:

Re 9-16-02

Exhibit 4

Service Certification

Service Provider Name	IBM Corporation
Service Provider SPIN	143005607
Service Provider Invoice #	2760274-09 (Web Access)
Undiscounted Invoice Amount	449,500.16
Discounted Invoice Amount	404,550.14

Applicant Name	El Paso Independent School District
Representative / Contact Name	Jack Johnston
Representative / Contact Title	Executive Director Technology & Information Systems
Representative / Contact Phone	915-779-4235
Billed Entity Number (BEN)	142118
471#	256606
FRN#	648758
Date Services Delivered and Installed	09/18/02

This is to certify that I am authorized to represent the above named applicant. This is also to certify the services described on the attached vendor invoice were delivered and installed.

Or The charges represented by the above represented invoice are deposits or up-front charges for services, which have not been delivered, and have been agreed to based on the contract between the above referenced Applicant and Service Provider.

Signed: <i>Jack Johnston</i>	Signed:
Date: <i>Sept 18, 2002</i>	Date:
Copy of <u>detailed</u> vendor invoice must be attached	Copy of <u>supporting contract</u> must be attached if indicated below Supporting Contract Required YES <input type="checkbox"/> NO <input type="checkbox"/>



IBM RALSERV
113

**IBM GLOBAL SERVICES
E-RATE INVOICE FOR SERVICES**

Please remit payment to:
IBM Global Services US
Jody Ryan
4100 Rio Bravo, Suite 104
El Paso, TX. 79902
303-773-5464

Invoice Number
C7C0K09

IBM Customer Number
2760274

Invoice Date
09/18/2002

Terms
DUE UPON RECEIPT

Invoice to:
El Paso Independent School District (EPISD)
6531 Boeing Drive
El Paso, TX 79925
915-779-4333

EPISD PO Number
234789

EPISD SLD FRN Number
648758

IBM Contract Number
CFT6QXH

PROJECT Reference
WEB ACCESS

IBM Work Number
C7C0K

Comments
Please reference the IBM Invoice number
and IBM Customer number on your check.

Vendor Number
21581

Page #
1 OF 1

Services provided August 2002 through September 2002.

Site and connectivity web access services support.

eb Access Infrastructure Support.

Web Access systems and maintenance, including design, installation, implementation and customization of web access functions.

Technical resources for web access maintenance support.

TOTAL

\$449,500.16

SLD PORTION DUE

\$404,550.14

EPISD PORTION DUE

\$44,950.02

**IF NOT PAID BY OCTOBER 18, 2002,
EPISD PLEASE PAY THIS AMOUNT**

\$45,511.89

This invoice is issued pursuant to the IBM Customer Agreement or the equivalent agreement between us.

IBM SIGNATURE:

EPISD SIGNATURE:

9/16/02
WJ 9/18

Exhibit 5

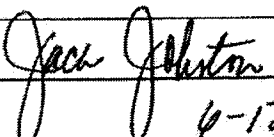
Service Certification

Service Provider Name	IBM Corporation
Service Provider SPIN	143005607
Service Provider Invoice #	2760274-06 (USF MA Services)
Undiscounted Invoice Amount	3,390,212.50
Discounted Invoice Amount	3,051,191.25

Applicant Name	El Paso Independent School District
Representative / Contact Name	Jack Johnston
Representative / Contact Title	Executive Director Technology & Information Systems
Representative / Contact Phone	915-779-4235
Billed Entity Number (BEN)	142118
471#	256606
FRN#	648793
Date Services Delivered and Installed	06/12/02

This is to certify that I am authorized to represent the above named applicant. This is also to certify the services described on the attached vendor invoice were delivered and installed.

Or The charges represented by the above represented invoice are deposits or up-front charges for services, which have not been delivered, and have been agreed to based on the contract between the above referenced Applicant and Service Provider.

Signed: 	Signed:
Date: 6-12-02	Date:
Copy of <u>detailed</u> vendor invoice must be attached	Copy of <u>supporting contract</u> must be attached if indicated below Supporting Contract Required YES NO



IBM PALSERV
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IBM GLOBAL SERVICES
E-RATE INVOICE FOR SERVICES

Please remit payment to:
IBM Global Services US
Jody Ryan
4700 S. Syracuse Street
Denver, CO 80237
303-773-5464

Invoice Number
CGSJK06

IBM Customer Number
2760274

Invoice Date
06/12/2002

Terms
DUE UPON RECEIPT

Invoice to:
El Paso Independent School District (EPISD)
6531 Boeing Drive
El Paso, TX 79925
915-779-4333

EPISD PO Number
234789

EPISD/SLD FRN Number
848793

IBM Contract Number
CFT55SH

PROJECT Reference
USF MA SERVICES

IBM Work Number
C6SJK

Comments
Please reference the IBM Invoice number
and IBM Customer number on your check.

Vendor Number
21581

Page #
1 OF 1

Services provided May 2002 through June 2002.

Maintenance Operations Center and maintenance support office.

Site and connectivity Networking Services Support.

Network Infrastructure Support

Local Area Network (LAN) Maintenance, including network hardware.

Maintenance procedures supporting networking systems and maintenance, including design,
installation, implementation and customization of network functions.

Technical resources for network maintenance support.

TOTAL

\$3,390,212.50

SLD PORTION DUE

\$3,051,191.25

EPISD PORTION DUE

\$339,021.25

IF NOT PAID BY JULY 12, 2002, EPISD
PLEASE PAY THIS AMOUNT

\$343,259.02

IBM SIGNATURE:

EPISD SIGNATURE:

Exhibit 6



Universal Service Administrative Company
Schools & Libraries Division

George McDonald
Vice President, Schools and Libraries Division

September 16, 2004

Bob Richter
National ERate Program Executive
IBM Corporation
166 Deer Run
Burlington, CT 06013

RE: El Paso Independent School District Funding Year 2001 FCC Form 471 # 256606

Dear Mr. Richter:

In Funding Year 2001, El Paso Independent School District (El Paso ISD) submitted FCC Form 471 # 256606 to the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) seeking funding for eight internal connections Funding Request Numbers (FRNs) and one Internet access FRN. IBM Corporation (IBM) is the service provider associated with each of these FRNs. USAC funded these requests and eventually disbursed \$55.3 million to IBM for providing the products and services to El Paso ISD.

USAC approved these funding requests based upon the FCC Form 471 Item 21 attachments submitted to USAC, and upon information provided to Program Integrity Assurance (PIA) reviewers during the review of the funding requests.

USAC has since obtained the Statements of Work that underlie each FRN. USAC's analysis of these Statements of Work raises significant questions about the eligibility of the actual products and services for which funding was disbursed to IBM. This analysis indicates that the Item 21 attachments generally do not accurately reflect the products and services identified in the Statements of Work. Specifically, USAC's analysis concludes that:

- The funding commitment for FRN 648646 should be analyzed to determine which costs are allocable to eligible products and services, and which to ineligible products and services. If no documentation is available, the funding commitment for this FRN should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648729 should undergo cost allocation based on the issues identified in the analysis. The funding commitment will need to be

rescinded in part and recovery sought for any amounts disbursed for ineligible products and services.

- The funding commitment for FRN 648758 should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648793 contains substantial ineligible services and must undergo cost allocation.
- The funding commitment for FRNs 648909, 648960, and 648594 should be analyzed to determine whether the funding commitment was limited to 52 locations at a 90% discount. If the funding commitment was not limited to 52 locations, the funding commitment will need to be rescinded in part and recovery sought for any amounts disbursed for products and services delivered to locations that do not qualify for a 90% discount. For FRN 648594, a final eligibility determination needs to be made for fiber exclusive access service.
- The funding commitments for FRNs 648857 and 648996 do not appear to raise eligibility issues.

The detailed analysis is enclosed for your review. Also enclosed are the Statements of Work on which the analysis is based.

USAC requests that you respond to USAC's eligibility determinations explained in the enclosed analysis. In some instances, it is not clear based on the information available at this time the extent to which the FRNs contain ineligible products and services. If you believe that all of the products and services for which funding was committed were eligible for funding, provide any and all documentation necessary to support your position. Furthermore, if you believe that all of the products and services for which USAC disbursed funds were eligible for funding, provide any and all documentation necessary to support your position.

USAC is required to adjust funding commitments and seek recovery as necessary when it determines that it made a funding commitment in error. If you do not respond to this request within 30 days of the date of the letter, USAC will base its commitment adjustment determinations on the documentation enclosed for your review.

We expect to work with you in making a final determination of the eligible and ineligible components of funding requests in this application, and I hope your response will advance that process.

Bob Richter
September 16, 2004
Page 3

Sincerely,



George McDonald
Vice President, Schools and Libraries Division

cc: Jack Johnston, Executive Director, TIS, El Paso Independent School District

Enclosures

Universal Service Administrative Company, Schools and Libraries Support Mechanism Eligibility Analysis

Statement of Work for El Paso Independent School District for Fiber Network Exclusive Internet Access
1/18/2001.

IBM Proposal to El Paso Independent School District for Cabling Services 1/18/2001.

IBM Statement of Work for El Paso Independent School District for Email 1/18/2001.

IBM Statement of Work for El Paso Independent School District for Network Electronics 1/18/2001.

IBM Statement of Work for El Paso Independent School District for Server Upgrade 1/18/2001.

IBM Statement of Work for El Paso Independent School District for IBM's Web Access for a School
Community Solution, 1/18/2001.

Contract for the Provision of USF Maintenance Services for El Paso Independent School District
1/18/2001.

IBM Statement of Work for Video Solution and Installation Services for El Paso Independent School
District, 1/18/2001.

IBM Statement of Work for El Paso Independent School District for Web and File Server Project 1/18/2001

Universal Service Administrative Company
Schools and Libraries Support Mechanism

ELIGIBILITY ANALYSIS
EL PASO INDEPENDENT SCHOOL DISTRICT
FUNDING YEAR 2001
FCC FORM 471 # 256606

OVERVIEW

This paper contains an analysis of the eligibility of products and services requested by El Paso Independent School District (EPISD) on FCC Form 471 # 256606, and funded by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC), for Funding Year 2001.

Of the nine FCC Forms 471 submitted by EPISD for Funding Year 2001, FCC Form 471 # 256606 stands out as having service eligibility issues. This Form 471 includes eight Internal Connections funding requests and one Internet Access funding request for a wide range of technology deployment, such as network electronics, video technology, file servers, and cabling.

During Program Integrity Assurance (PIA) Review, SLD determined that some Funding Request Number(s) (FRNs) contained ineligible components, and the costs of those components were removed from the FRNs prior to approval. ~~Apart from this standard process, no significant eligibility issues were apparent under then current review procedures.~~

Subsequently, SLD obtained the Statements of Work for each FRN on this Form 471 application. SLD has evaluated these Statements of Work and other relevant information, and has determined, based on this documentation, that some FRNs are in fact NOT eligible for funding, and that there are questions about the extent to which other FRNs are eligible for funding.

FCC FORM 471 # 25606

Below is a table indicating the amount committed and disbursed for each FRN on this FCC Form 471 application. The final column below states the results of SLD's review based on the Statements of Work for each FRN.

<u>FRN</u>	<u>FUNCTIONALITY</u>	<u>COMMITTED \$</u>	<u>DISBURSED \$</u>	<u>ANALYSIS CONCLUSION</u>
648646*	E-mail	\$3,229,025.65	\$3,229,025.25	Ineligible components must be cost allocated
648729*	Video	\$3,902,493.60	\$3,324,008.12	Requires cost allocation;

Universal Service Administrative Company
Schools and Libraries Support Mechanism

				questions raised
648758	Web Access	\$2,457,027.90	\$2,457,027.87	NOT ELIGIBLE
648793	Maintenance	\$24,409,530.00	\$24,409,530.00	Substantial ineligible services must be cost allocated.
648857*	Network Electronics	\$10,472,940.00	\$9,042,502.06	No issues apparent
648909*	Server Upgrades	\$2,627,730.00	\$1,506,832.13	Quantity changes appear acceptable. Need to verify location of servers.
648960*	Web & File Servers	\$5,850,540.00	\$3,374,300.63	Quantity changes appear acceptable. Need to verify location of servers. Needs cost allocation to subtract ineligible functionality.
648996	Network Cabling	\$7,080,660.00	\$7,080,660.00	No issues apparent
648594	Internet Access	\$3,591,810.00	\$878,310.00	Need to make final eligibility determination for fiber exclusive access service, and need to

Universal Service Administrative Company
Schools and Libraries Support Mechanism

				determine if service was limited to 52 locations.
--	--	--	--	--

* Those FRN's marked with an asterisk had service substitution requests submitted after approval of the funding request. None of the service substitution requests appears to change the analysis in this report.

Thus, for the nine funding requests, this analysis concludes that one is clearly not eligible for funding, six raise further questions, and two appear to raise no eligibility questions that cannot be answered from a review of existing information.

This analysis does not necessarily identify every questionable or ineligible product or service in the Statement of Work, but relies on significant examples of core eligibility issues.

E-mail Funding Request (FRN 648646)

The Item 21 Attachment submitted in support of the FRN contained some components (data cartridges and cleaning cartridges) that are not eligible for funding. Costs for these components were removed from the FRN by PIA Review personnel. No other indications of ineligible products or services were apparent based only on review of the Item 21 Attachment.

Subsequently, a copy of the service provider's Statement of Work was obtained. Page 4 of the Statement of Work indicates that "all non e-rate eligible products and services are excluded from this agreement and is (sic) included in a separate contract." This phrase indicates that all aspects of the Statement of Work were felt to be E-rate eligible. However, significant aspects of the Statement of Work are clearly not eligible under SLD program rules.

Examples from the Statement of Work that indicate ineligible services include:

- "[P]erform planning and assessment for email deployment," i.e., ineligible consulting services
- "Develop distributed email architecture," i.e., ineligible consulting services
- "Specify email server sizing & configuration," i.e., ineligible consulting services, since server size and configuration have already been specified in the Form 471
- "Develop minimum client specifications for desktop hardware, software, and Operating systems," i.e., ineligible consulting, since such end user components are not eligible for E-rate funds
- "Assist in development of district-wide email Policies & Procedures, i.e., ineligible consulting

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- “Develop end-user training curriculum and materials, and train trainers,” i.e., ineligible training
- “Develop graphic & layout design standards,” i.e., ineligible content development
- Provide “free firewall software,” i.e., ineligible security functions that require a cost reduction to be compliant with the SLD Free Services Advisory
- “[P]rovide CyberPatrol content filtering on two servers to allow content filtering of Internet access,” i.e., ineligible filtering software
- “Establish and facilitate a District Web Policy Steering Committee,” i.e., ineligible consulting since this function is not directly tied to the actual installation and initial operation of eligible components
- “Assist in developing District-wide Policies and Procedures,” i.e., ineligible consulting
- “Develop a comprehensive Web implementation strategy, including input from stakeholders throughout the district,” i.e., ineligible consulting.
- “Develop a strategy for distributed Web maintenance, including template-based design and designated Content Managers,” i.e., ineligible support for ineligible content
- “Provide a toolkit of reusable Web component templates,” i.e., ineligible content software
- Provide Content Manager Training,” i.e., ineligible training
- “Conduct research & planning for future Intranet integration with internal systems,” i.e., ineligible consulting
- “We will provide and install three Domino applications as pilots...” i.e., ineligible software

A determination of the costs of these ineligible components is required.

Video Funding Request (FRN 648729)

The Statement of Work provides substantially more detail than what is provided by the applicant's Item 21 Attachment. It specifies products that are not eligible, or that require cost allocation, as follows:

- (17) Cisco Archive Server
- (16) Cisco Content Engine

The Archive Server provides ineligible caching. The Content Engine also includes ineligible caching, and additionally includes some eligible functionality. The full cost of the Archive Servers must be eliminated from the funding request, and a percentage of the cost of the Content Engines must be eliminated from the funding request. The Statement of Work specifically indicates that there has been no subtraction for the ineligible functionality.

Perhaps more fundamentally, the Statement of Work consistently indicates that the video solution is to be implemented for 90 locations, whereas only 52 locations are specified in

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Block 5 of Form 471. The applicant's Block 4 information includes a listing of 52 schools with a shared discount of 90%, and also includes a listing of 91 locations with a shared discount of 78%. This raises the question of whether the funding request is for the 52 sites with a shared discount of 90% only, or whether it also included the additional 39 locations with a shared discount of 78%.

The Statement of Work indicates that "IBM will...operate...the video solution for EPISD for a period of one year." Operation of video components is not eligible for funding. The Statement of Work indicates that a "dedicated support staff (3) will be assigned to EPISD to ensure proper coverage." This is taken to mean that three contractor persons will be devoted to operation of the equipment, as well as administration and support. Dedicated contractor personnel have been funded by SLD when the maintenance requirements of a large applicant can justify this arrangement in comparison to on-call personnel. However, this arrangement cannot be interpreted as providing for operational services that would otherwise be provided by the applicant's own staff.

The Statement of Work indicates that the video solution requirements will be re-verified, and that the development of the current list of requirements will affect the final design of the solution. Technical services such as program management and engineering design can be eligible for funding if directly tied to installation and operation, but are not eligible if involved with initial planning activities. Further investigation of the scope and details of this aspect of the project would be required to determine the extent of ineligible services.

Web Access Funding Request (FRN 648758)

The Statement of Work reveals that the funding request is for a product called "IBM Web Access for a School Community." This product has been determined to be a collaboration package that provides application software, and is ineligible for funding.

Maintenance Funding Request (FRN 648793)

The Item 21 Attachment for maintenance services described two principal activities, hardware maintenance and technical support. A review of the Statement of Work indicates that an extensive on-site "Maintenance Support Office" was to be provided. This was a comprehensive Help Desk facility that provided a level of services well beyond the scope of other support services seen by SLD staff. The services described in the Statement of Work appear to have been integrally tied to the provision of ineligible components.

A computer "Help Desk" accepts support calls from end users, and initiates action to resolve the problem. This action might involve initial diagnostics, creation of a Trouble Ticket, logging the support call, and alerting other personnel that a problem exists. Such

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a Help Desk function is not eligible under SLD program rules, because it is not limited only to support of the products and services that are eligible for E-rate funds.

The Statement of Work indicates that the Help Desk would “[a]ccept support related calls from end users.” Calls from end-users would include problems with end-user workstation operating systems and hardware, and potentially other areas such as questions about the operation and configuration of end-user software. Such end user support is clearly not eligible for E-rate funding. Even if the actual correction of a problem involves non-contractor personnel, and is therefore not reimbursed with E-rate funds, the routing and logging function of the comprehensive Help Desk activities would include ineligible support services.

Furthermore, a comprehensive Help Desk system goes beyond the level of support authorized by the FCC in the original Universal Service Order: “[S]upport should be available to fund discounts on such items as routers, hubs, network file services, and wireless LANs and their installation and basic maintenance....” See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, FCC 97-157 ¶ 460 (rel. May 8, 1997). (Emphasis added.) There is no authorizing language that provides for the level of support provided by the Help Desk facility described in the Statement of Work.

On the contrary, paragraph 459 of the original Universal Service Order indicates that support will be provided for a product or service “only if it is necessary to transport information all the way to individual classrooms. That is, if the service is an essential element in the transmission of information within the school or library....” (Emphasis added.)

The lack of eligibility for many or all of the Help Desk services is not a determination that such facilities have no value, but simply that they fail to meet eligibility requirements. Industry information indicates that approximately 20% of a technology implementation can be funded through E-rate eligibility, with the remaining 80% not eligible. (See, for example, paragraph 497 in the “97 Report and Order.)

Network Electronics Funding Request (FRN 648857)

No product and service eligibility issues were apparent in the review of the Network Electronics Statement of Work.

Server Upgrade Funding Request (FRN 648909)

The Statement of Work specifies that up to 90 file servers will be installed. Only 52 locations are specified in the Form 471 as having a 90% shared discounts. Briefing information from the service provider indicates that the applicant erred in the quantity specification, and that the correct number is 52 file servers. Further investigation is

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needed to determine whether the original funding commitment was for file servers at 90 locations, or for file servers at the 52 locations that had a 90% discount.

Web & File Server Funding Request (FRN 648960)

The Statement of Work specifies that up to 90 file servers and up to 90 web servers will be installed. Technical specifications of these servers are identical to the technical specifications of the servers in the previous section of this analysis. Briefing information from the service provider indicates that the applicant erred in the quantity specification, and that the correct number is 52 file servers and 52 web servers. Further investigation is needed to determine whether the original funding commitment was for file servers at 90 locations, or for file servers at the 52 locations that had a 90% discount.

The Statement of Work indicates that proxy, DHCP, and server caching will be provided. Proxy services and caching are not eligible uses. Therefore, the proportion of server functionality providing these ineligible features should be determined and the appropriate ineligible cost calculated.

Network Cabling Funding Request (FRN 648996)

No product and service eligibility issues were apparent in the review of the Network Cabling Statement of Work.

Internet Access Funding Request (FRN #648594)

The Internet Access Statement of Work indicates that high bandwidth access will be provided for up to 90 campuses. Since only 52 locations are a part of the specification for this funding request, this raises the question of whether the funding request is for the 52 sites with a shared discount of 90% only, or whether it also included the additional 39 locations with a shared discount of 78%.

Furthermore, the Statement of Work indicates that "fiber high speed optic cable or other digital media" will be "used for exclusive access to the Internet." The FCC has raised high concern over exclusive access arrangements, and indicates that funding is not to be provided for arrangements that, even if titled a lease of services, reach essentially the same result as a prohibited WAN purchase. Further information is required to make a final determination, including whether a lease-purchase option exists and whether E-rate funds were requested for up-front costs of service provider infrastructure.

CONCLUSION

The analysis above indicates the following:

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- The funding commitment for FRN 648646 should be analyzed to determine which costs are allocable to eligible products and services, and which to ineligible products and services. If no documentation is available, the funding commitment for this FRN should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648729 should undergo cost allocation based on the issues identified in the analysis. The funding commitment will need to be rescinded in part and recovery sought for any amounts disbursed for ineligible products and services.
- The funding commitment for FRN 648758 should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648793 contains substantial ineligible services and must undergo cost allocation.
- The funding commitment for FRNs 648909, 648960, and 648594 should be analyzed to determine whether the funding commitment was limited to 52 locations at a 90% discount. If the funding commitment was not limited to 52 locations, the funding commitment will need to be rescinded in part and recovery sought for any amounts disbursed for products and services delivered to locations that do not qualify for a 90% discount. For FRN 648594, a final eligibility determination needs to be made for fiber exclusive access service.
- The funding commitments for FRNs 648857 and 648996 do not appear to raise eligibility issues.

Exhibit 7



Mel Blackwell
Vice President, Schools and Libraries Division (Acting)

Schools and Libraries Division

June 19, 2006

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IBM Corporation
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Business Services, Technology and Information Systems
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RE: El Paso Independent School District Funding Year 2001 FCC Form 471 # 256606

Dear Mr. Richter, Mr. Wening and Ms. Jordan:

In Funding Year 2001, El Paso Independent School District (El Paso ISD) submitted FCC Form 471 # 256606 to the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) seeking funding for eight internal connections Funding Request Numbers (FRNs) and one Internet access FRN. IBM Corporation (IBM) is the service provider associated with each of these FRNs. USAC funded these requests and eventually disbursed \$55.3 million to IBM for providing the products and services to El Paso ISD.

USAC later learned that the funding requests may not have been in compliance with Federal Communications Commission (FCC or Commission) rules governing the

Schools and Libraries program. On September 16, 2004, USAC notified IBM of its initial eligibility determinations for each FRN based on documentation that had been provided to USAC after USAC made its original funding decision, and requested that IBM respond to USAC's eligibility determinations.¹ USAC later contacted El Paso ISD for information related to certain FRNs for which El Paso ISD could provide relevant information.

Since that time, IBM and El Paso ISD have responded to USAC's preliminary eligibility determinations and questions, and USAC has almost completed its review to determine whether ineligible products and services were provided for certain funding requests. With this letter, we are providing IBM and El Paso ISD a final opportunity to submit additional information as explained below to enable USAC to make its final determinations.

Regulatory Background

Commission rules require USAC to provide funding for eligible products and services.² With the exception of ancillary ineligible components, where products and services contain eligible and ineligible components, "costs must be allocated to the extent that a clear delineation can be made between the eligible and ineligible components. The delineation must have a tangible basis, and the price for the eligible portion must be the most cost-effective means of receiving the eligible service."³ The cost allocation must be based on tangible criteria that provides a realistic result.⁴

The Commission requires USAC to rescind funding commitments and seek recovery of funds disbursed when USAC determines that it committed funds in error because the commitment constitutes a violation of the Communications Act of 1934, as amended,⁵ or a violation of Commission rules.⁶ USAC also seeks Recovery of

¹ Letter from George McDonald, Vice President, Schools and Libraries Division, USAC, to Bob Richter, National ERate Program Executive, IBM Corporation, September 16, 2004 (*September 16 Letter*).

² See 47 C.F.R. §§ 54.501, 54.502, 54.503, 54.517, 54.518, 54.519, 54.522.

³ 47 C.F.R. § 54.504(c). ~~Cost allocation guidelines for allocating costs between eligible and ineligible services. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Red 20922 (2003) (Schools and Libraries Third Order).~~

⁴ <http://www.universalservice.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx>.

⁵ 47 U.S.C. § 254.

⁶ See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, FCC 99-291 (1999) (*Commitment Adjustment Order*); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 15 FCC Red 7197 (1999) (*Commitment Adjustment Waiver Order*); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 15 FCC Red 22975 (2000) (*Commitment Adjustment Implementation Order*).

Improperly Disbursed funds when funds were disbursed in violation of the statute or Commission rules, but the original commitment was consistent with the statute or Commission rules. When applicants and service providers disagree with any of USAC's commitment adjustment and/or recovery decisions, those decisions can be appealed to USAC and/or the Commission.⁷

Overview of USAC's Determinations

USAC has reviewed the documentation provided by IBM and/or El Paso ISD and has determined that no commitment adjustments or recoveries will be sought at this time for FRNs 648909, 648594, 648857, or 648996. For FRN 648758, USAC will seek recovery of \$1,279,631.59 from IBM disbursed for ineligible items based on information provided by IBM. For the remaining four FRNS, in the paragraphs below, USAC explains the basis for its eligibility determination and requests further information so that USAC can make the final recovery determination. For these FRNs, USAC has carefully considered IBM and El Paso ISD's responses, and has determined that ineligible products and/or services were funded by USAC and/or provided by IBM. However, USAC has not received information that will allow us to perform a cost allocation in order to separate the ineligible products and services from eligible products and services. Consequently, with this letter we request that additional information.

When USAC determines that both eligible and ineligible products and services have been provided, USAC adjusts the funding commitment and seeks recovery of the ineligible portion only. When USAC is not provided with the information necessary to separate the eligible and ineligible portions, USAC rescinds the entire commitment for that FRN and seeks recovery of the full amount disbursed.⁸ Therefore, we encourage you to provide specific information that will allow USAC to perform a cost allocation in those cases where the ineligible products and/or services represent only a portion of the total funding request. To the extent you disagree with USAC's eligibility determination and/or cost allocation, Commission rules provide that you can appeal those decisions to USAC and/or the FCC as explained above.

Also provided below are examples of approaches to cost allocation which you may wish to use as a guide in providing this information to USAC. You may use an alternative approach as long as it meets cost allocation requirements. Detailed information about cost allocation is available at USAC's website at <http://www.universalservice.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx>.

⁷ See 47 C.F.R. §§ 54.719-54.725

⁸ See *Schools and Libraries Third Order* ¶ 32 (2003).

E-mail Funding Request (FRN 648646)

USAC funded \$3,229,025.65 for this FRN and disbursed the full amount to IBM. USAC identified 17 descriptions, out of approximately 44, in the relevant Statement of Work that appeared to indicate ineligible components. IBM responded that products and services for Design and Engineering, Training, and Provide Documentation are eligible for funding.⁹ Additionally, IBM provided a list of services for which it was unsure whether the items are eligible for funding.

IBM also submitted an unexecuted Change Authorization to support its position that ineligible services which were initially included in the Statement of Work were never performed.¹⁰ IBM stated that this Change Authorization eliminated the ineligible items, and that "Sld was not invoiced for these tasks."¹¹ However, USAC reviewed invoicing documentation submitted by IBM and/or El Paso ISD to USAC for this FRN and has determined that USAC was invoiced and disbursed funds for ineligible items that were included on the Statement of Work, but purportedly eliminated by the Change Authorization. That is, services which were eliminated by the Change Authorization were in fact delivered and funds were disbursed. Copies of invoicing records supporting this conclusion are provided as Attachment 1 to this letter. Therefore, since the Change Authorization is unexecuted, and since documentation in USAC's files conflict with the Change Authorization, USAC rejects the Change Authorization as a basis for determining which products and services were provided for this FRN.

USAC agrees that many services outlined in the Statement of Work are eligible for funding. For example, the following services and several others in the Statement of Work appear to be fully eligible:

- Install and configure central email server cluster
- Install and configure DNS server
- Test, and performance-tune servers and mail routing performance
- Configure, and test for connectivity with external mail providers.

However, USAC has determined that 15 descriptions out of approximately 44, are not eligible for funding. These 15 descriptions are indicated in Attachment 2 to this letter.¹²

⁹ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to George McDonald, Vice President, Schools and Libraries Division, USAC, March 25, 2005.

¹⁰ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Phil Gieseler, Eligible Services Manager, Schools and Libraries Division, USAC, August 17, 2005.

¹¹ *Id.*

¹² USAC sought information from IBM regarding 17 descriptions that appeared to indicate ineligible services. In two cases, IBM's response satisfactorily answered the questions raised. The Statement of Work indicated that IBM would "[d]evelop end-user training curriculum, and train trainers," whereas end-

Since USAC has determined that both eligible and ineligible services have been provided, but has not been provided cost allocation to separate the eligible and ineligible costs, USAC must seek recovery for the full amount disbursed unless you provide an acceptable cost allocation. USAC believes that IBM is best-positioned to provide this information. Under the circumstances present here, if we receive information that each of the approximately 44 components to the funding request involved about the same level of effort, then the funding request could be cost allocated so that recovery would be sought for 15/44 of the funds disbursed. This would meet the required criteria for being based on tangible criteria that provides a realistic result. IBM may use this approach, or another one that meets the FCC's cost allocation requirements. An alternate approach could include weighting for the level of effort utilized for each of the component parts of the funding request.

Video Funding Request (FRN 648729)

USAC funded \$3,902,493.60 for this FRN and disbursed \$3,324,008.12 to IBM. USAC raised two questions related to this FRN: (1) Why the associated costs such as equipment component and labor costs did not decrease when the number of sites originally funded – 90 – was decreased to 53, and (2) whether ineligible products and services were provided.¹³ With respect to the number of sites funded, IBM responded that the cost of the equipment was decreased by \$641,762, but that the associated costs for installation and configuration services did not decrease.¹⁴ With respect to the provision of ineligible services, USAC has reviewed IBM's responses and has determined that it appears no ineligible services were actually provided.

However, with respect to the amount disbursed for both products and services provided to the reduced number of sites, USAC concludes that there should have been a corresponding decrease in associated costs when the number of sites decreased from 90 to 53, even though IBM has indicated that there was no decrease for the services performed. Consequently, USAC requests that IBM provide a cost allocation to indicate the portion of costs attributable to the 37 sites that were funded prior to the decrease in the scope of the project. USAC believes that IBM is best-positioned to provide this information.

user training is not eligible. However, IBM indicated that the training provided consisted of training to the applicant's technical staff, which can be eligible. In addition, the Statement of Work indicated that IBM would "[d]evelop minimum client specifications for desktop hardware, software, and Operating systems," whereas such planning activities for ineligible end-user equipment is not eligible. However, IBM indicated that the services consisted of providing certain "best practice" documents from a library of existing information, which can be a *de minimis* activity not subject to cost allocation. For the 15 remaining descriptions, neither IBM nor El Paso ISD has satisfactorily rebutted USAC's ineligibility determinations.

¹³ See September 16, 2004 Letter at 2; Eligibility Analysis (attachment to letter) at 4-5.

¹⁴ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Phil Gieseler, Eligible Service Manager, Schools and Libraries Division, USAC, August 17, 2005.

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Under the circumstances present here, a cost allocation based on a proportion representing a ratio of 53 divided by 90 can be considered eligible, with the balance not eligible, would meet the required criteria for being based on tangible criteria that provides a realistic result. IBM may use this approach, or another one that meets the FCC's cost allocation requirements.

Web and File Server Funding Request (FRN 648960)

USAC funded \$5,850,540 for this FRN and disbursed \$3,374,300 to IBM. USAC has requested information about the specific uses of the servers from El Paso ISD in order to determine whether the servers are being used only for eligible purposes. El Paso ISD responded that the file servers are used for "web-based access to email and to a file server."¹⁵ This response does not provide the information USAC needs to determine whether the file servers are being used only for eligible purposes.

Under the circumstances present here, a cost allocation based on the number of eligible and ineligible uses would meet the required criteria for being based on tangible criteria that provides a realistic result. USAC believes that El Paso ISD is best-positioned to provide this information. For example, if some file servers are being used as web servers (which are eligible), e-mail servers (which are eligible), application servers (which are not eligible) and storage of non-e-mail end-user files (which are not eligible), the cost allocation based on the proportion of eligible and ineligible functions would be 50%. El Paso ISD may use this approach, or another one that meets the FCC's cost allocation requirements.

For your reference, common server types are provided in Attachment 3 to this letter. Please identify all of the actual uses for each of the servers provided under this funding request.

Maintenance Services Funding Request (FRN 648793)

USAC funded \$24,409,530 for this FRN and disbursed the full amount funded to IBM. USAC questioned whether the FRN included substantial ineligible items.¹⁶ IBM disagrees that this FRN includes any ineligible items and argues that at the time this FRN was funded, it was eligible for funding in its entirety.¹⁷

¹⁵ Letter from Terri Jordan, Executive Director, Technology and Information Systems, El Paso Independent School District, to Philip Gieseler, Schools and Libraries Division, USAC, August 19, 2005 at p.3.

¹⁶ See September 16, 2004 Letter at 2; Eligibility Analysis (attached) at 5-6.

¹⁷ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to George McDonald, Vice President, Schools and Libraries Division, USAC, March 25, 2005.

At the United States House Committee on Energy and Commerce, Oversight and Investigations Subcommittee hearing held on September 22, 2004 entitled "Problems with the E-rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of our Nation's Schools to the Internet," IBM testified that services outside of eligible basic maintenance were provided as a part of this funding request.¹⁸ IBM further testified that services were provided for only two and one half months before the end of the last day to receive service for this FRN on September 30, 2002.¹⁹

In the Universal Service Order, the Commission held that support can be provided for "basic maintenance services" that are "necessary to the operation of the internal connections network."²⁰ In the *Ysleta Order*, the Commission directed USAC to ensure that it complied with this holding when it reviewed subsequent funding requests:

When SLD reviews the applications that are submitted after the rebidding occurs, it should ensure that discounts are provided only for "basic maintenance" and not for technical support that falls outside the scope of that deemed eligible in the *Universal Service Order*. (emphasis added.)²¹

The Commission clarified in the *Schools and Libraries Third Order* that help desks that provide a comprehensive level of support beyond basic maintenance of only eligible components are ineligible for funding.²² While the *Ysleta Order* and the *Schools and Libraries Third Order* were released by the FCC subsequent to the funding requests at issue here, in these orders the Commission clarified and reaffirmed the essential holding in the original *Universal Service Order*.

USAC has determined, consistent with the *Universal Service Order*, that this FRN included substantial ineligible items. The details related to this FRN indicate that in order to provide the services, IBM created an extensive facility for maintenance support. While basic maintenance services of eligible components are eligible, the creation of an extensive support structure for the delivery of those services is not eligible. Additionally, information submitted to the House Oversight Committee indicates that up to \$16 million

¹⁸ Problems with the E-rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of our Nation's Schools to the Internet Part 3: Hearing before the Subcomm. On Oversight and Investigations of the H. Comm. On Energy and Commerce, 108th Cong., pp. 260-262 (2004) (*Hearing Record*).

¹⁹ *Hearing Record*, pp. 260-262.

²⁰ *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, Report and Order, 12 FCC Red 8776, 8784-85, ¶ 460 (1997).

²¹ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al. Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Red 6858 ¶ 64 (2003).

²² *Schools and Libraries Third Order* ¶ 24.

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of the funding request was used for developing the infrastructure and tools as opposed to the delivery of actual, eligible support services.²³ The ineligible items are those which were used to create the facility and which are not eligible in themselves. Additionally, while USAC disbursed the full amount committed for this FRN, services were provided for only two and a half months.

USAC requests IBM provide details underlying the \$24,409,530 disbursed for this FRN and an acceptable cost allocation, so that USAC can seek recovery limited to the ineligible portion of the funding request. USAC believes that IBM is best-positioned to provide this information. The cost allocation should meet the required criteria for being based on tangible criteria that provides a realistic result. USAC expects that IBM will identify costs related to the services actually provided during the two and a half month time period so that USAC can seek recovery for the costs of service not provided to El Paso ISD.

Please provide the information requested to USAC within 30 days of the date of this letter so that USAC can issue commitment adjustment and recovery letters, as appropriate. If USAC does not receive this information within 30 days, USAC will seek recovery based on the information we currently have.

Thank you for your continued attention to this important matter.

Sincerely,



Mel Blackwell
Vice President, Schools and Libraries Division (Acting)

Enclosures

²³Hearing Record, p. 260-262, 563-564.

Universal Service Administrative Company
Schools and Libraries Program

Attachment 1

Invoice Detail

IBM Invoices to El Paso Independent School District for

1. SLC Invoice # 277690
2. SLC Invoice # 285120
3. SLC Invoice # 292471
4. SLC Invoice # 296643
5. SLC Invoice # 298428
6. SLC Invoice # 303454
7. SLC Invoice # 311403
8. SLC Invoice # 318182
9. SLC Invoice # 326305

Universal Service Administrative Company
Schools and Libraries Support Mechanism

ELIGIBILITY ANALYSIS
EL PASO INDEPENDENT SCHOOL DISTRICT
FUNDING YEAR 2001
FCC FORM 471 # 256606

OVERVIEW

This paper contains an analysis of the eligibility of products and services requested by El Paso Independent School District (EPISD) on FCC Form 471 # 256606, and funded by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC), for Funding Year 2001.

Of the nine FCC Forms 471 submitted by EPISD for Funding Year 2001, FCC Form 471 # 256606 stands out as having service eligibility issues. This Form 471 includes eight Internal Connections funding requests and one Internet Access funding request for a wide range of technology deployment, such as network electronics, video technology, file servers, and cabling.

During Program Integrity Assurance (PIA) Review, SLD determined that some Funding Request Number(s) (FRNs) contained ineligible components, and the costs of those components were removed from the FRNs prior to approval. Apart from this standard process, no significant eligibility issues were apparent under then-current review procedures.

Subsequently, SLD obtained the Statements of Work for each FRN on this Form 471 application. SLD has evaluated these Statements of Work and other relevant information, and has determined, based on this documentation, that some FRNs are in fact NOT eligible for funding, and that there are questions about the extent to which other FRNs are eligible for funding.

FCC FORM 471 # 25606

Below is a table indicating the amount committed and disbursed for each FRN on this FCC Form 471 application. The final column below states the results of SLD's review based on the Statements of Work for each FRN.

<u>FRN</u>	<u>FUNCTIONALITY</u>	<u>COMMITTED \$</u>	<u>DISBURSED \$</u>	<u>ANALYSIS CONCLUSION</u>
648646*	E-mail	\$3,229,025.65	\$3,229,025.25	Ineligible components must be cost allocated
648729*	Video	\$3,902,493.60	\$3,324,008.12	Requires cost allocation;

Universal Service Administrative Company
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				questions raised
648758	Web Access	\$2,457,027.90	\$2,457,027.87	NOT ELIGIBLE
648793	Maintenance	\$24,409,530.00	\$24,409,530.00	Substantial ineligible services must be cost allocated.
648857*	Network Electronics	\$10,472,940.00	\$9,042,502.06	No issues apparent
648909*	Server Upgrades	\$2,627,730.00	\$1,506,832.13	Quantity changes appear acceptable. Need to verify location of servers.
648960*	Web & File Servers	\$5,850,540.00	\$3,374,300.63	Quantity changes appear acceptable. Need to verify location of servers. Needs cost allocation to subtract ineligible functionality.
648996	Network Cabling	\$7,080,660.00	\$7,080,660.00	No issues apparent
648594	Internet Access	\$3,591,810.00	\$878,310.00	Need to make final eligibility determination for fiber exclusive access service, and need to

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				determine if service was limited to 52 locations.
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* Those FRN's marked with an asterisk had service substitution requests submitted after approval of the funding request. None of the service substitution requests appears to change the analysis in this report.

Thus, for the nine funding requests, this analysis concludes that one is clearly not eligible for funding, six raise further questions, and two appear to raise no eligibility questions that cannot be answered from a review of existing information.

This analysis does not necessarily identify every questionable or ineligible product or service in the Statement of Work, but relies on significant examples of core eligibility issues.

E-mail Funding Request (FRN 648646)

The Item 21 Attachment submitted in support of the FRN contained some components (data cartridges and cleaning cartridges) that are not eligible for funding. Costs for these components were removed from the FRN by PIA Review personnel. No other indications of ineligible products or services were apparent based only on review of the Item 21 Attachment.

Subsequently, a copy of the service provider's Statement of Work was obtained. Page 4 of the Statement of Work indicates that "all non e-rate eligible products and services are excluded from this agreement and is (sic) included in a separate contract." This phrase indicates that all aspects of the Statement of Work were felt to be E-rate eligible. However, significant aspects of the Statement of Work are clearly not eligible under SLD program rules.

Examples from the Statement of Work that indicate ineligible services include:

- "[P]erform planning and assessment for email deployment," i.e., ineligible consulting services
- "Develop distributed email architecture," i.e., ineligible consulting services
- "Specify email server sizing & configuration," i.e., ineligible consulting services, since server size and configuration have already been specified in the Form 471
- "Develop minimum client specifications for desktop hardware, software, and Operating systems," i.e., ineligible consulting, since such end user components are not eligible for E-rate funds
- "Assist in development of district-wide email Policies & Procedures, i.e., ineligible consulting

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- “Develop end-user training curriculum and materials, and train trainers,” i.e., ineligible training
- “Develop graphic & layout design standards,” i.e., ineligible content development
- Provide “free firewall software,” i.e., ineligible security functions that require a cost reduction to be compliant with the SLD Free Services Advisory
- “[P]rovide CyberPatrol content filtering on two servers to allow content filtering of Internet access,” i.e., ineligible filtering software
- “Establish and facilitate a District Web Policy Steering Committee,” i.e., ineligible consulting since this function is not directly tied to the actual installation and initial operation of eligible components
- “Assist in developing District-wide Policies and Procedures,” i.e., ineligible consulting
- “Develop a comprehensive Web implementation strategy, including input from stakeholders throughout the district,” i.e., ineligible consulting.
- “Develop a strategy for distributed Web maintenance, including template-based design and designated Content Managers,” i.e., ineligible support for ineligible content
- “Provide a toolkit of reusable Web component templates,” i.e., ineligible content software
- Provide Content Manager Training,” i.e., ineligible training
- “Conduct research & planning for future Intranet integration with internal systems,” i.e., ineligible consulting
- “We will provide and install three Domino applications as pilots...” i.e., ineligible software

A determination of the costs of these ineligible components is required.

Video Funding Request (FRN 648729)

The Statement of Work provides substantially more detail than what is provided by the applicant's Item 21 Attachment. It specifies products that are not eligible, or that require cost allocation, as follows:

- (17) Cisco Archive Server
- (16) Cisco Content Engine

The Archive Server provides ineligible caching. The Content Engine also includes ineligible caching, and additionally includes some eligible functionality. The full cost of the Archive Servers must be eliminated from the funding request, and a percentage of the cost of the Content Engines must be eliminated from the funding request. The Statement of Work specifically indicates that there has been no subtraction for the ineligible functionality.

Perhaps more fundamentally, the Statement of Work consistently indicates that the video solution is to be implemented for 90 locations, whereas only 52 locations are specified in

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Block 5 of Form 471. The applicant's Block 4 information includes a listing of 52 schools with a shared discount of 90%, and also includes a listing of 91 locations with a shared discount of 78%. This raises the question of whether the funding request is for the 52 sites with a shared discount of 90% only, or whether it also included the additional 39 locations with a shared discount of 78%.

The Statement of Work indicates that "IBM will...operate...the video solution for EPISD for a period of one year." Operation of video components is not eligible for funding. The Statement of Work indicates that a "dedicated support staff (3) will be assigned to EPISD to ensure proper coverage." This is taken to mean that three contractor persons will be devoted to operation of the equipment, as well as administration and support. Dedicated contractor personnel have been funded by SLD when the maintenance requirements of a large applicant can justify this arrangement in comparison to on-call personnel. However, this arrangement cannot be interpreted as providing for operational services that would otherwise be provided by the applicant's own staff.

The Statement of Work indicates that the video solution requirements will be re-verified, and that the development of the current list of requirements will affect the final design of the solution. Technical services such as program management and engineering design can be eligible for funding if directly tied to installation and operation, but are not eligible if involved with initial planning activities. Further investigation of the scope and details of this aspect of the project would be required to determine the extent of ineligible services.

Web Access Funding Request (FRN 648758)

The Statement of Work reveals that the funding request is for a product called "IBM Web Access for a School Community." This product has been determined to be a collaboration package that provides application software, and is ineligible for funding.

Maintenance Funding Request (FRN 648793)

The Item 21 Attachment for maintenance services described two principal activities, hardware maintenance and technical support. A review of the Statement of Work indicates that an extensive on-site "Maintenance Support Office" was to be provided. This was a comprehensive Help Desk facility that provided a level of services well beyond the scope of other support services seen by SLD staff. The services described in the Statement of Work appear to have been integrally tied to the provision of ineligible components.

A computer "Help Desk" accepts support calls from end users, and initiates action to resolve the problem. This action might involve initial diagnostics, creation of a Trouble Ticket, logging the support call, and alerting other personnel that a problem exists. Such

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a Help Desk function is not eligible under SLD program rules, because it is not limited only to support of the products and services that are eligible for E-rate funds.

The Statement of Work indicates that the Help Desk would “[a]ccept support related calls from end users.” Calls from end-users would include problems with end-user workstation operating systems and hardware, and potentially other areas such as questions about the operation and configuration of end-user software. Such end user support is clearly not eligible for E-rate funding. Even if the actual correction of a problem involves non-contractor personnel, and is therefore not reimbursed with E-rate funds, the routing and logging function of the comprehensive Help Desk activities would include ineligible support services.

Furthermore, a comprehensive Help Desk system goes beyond the level of support authorized by the FCC in the original Universal Service Order: “[S]upport should be available to fund discounts on such items as routers, hubs, network file services, and wireless LANs and their installation and basic maintenance....” See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, FCC 97-157 ¶ 460 (rel. May 8, 1997). (Emphasis added.) There is no authorizing language that provides for the level of support provided by the Help Desk facility described in the Statement of Work.

On the contrary, paragraph 459 of the original Universal Service Order indicates that support will be provided for a product or service “only if it is necessary to transport information all the way to individual classrooms. That is, if the service is an essential element in the transmission of information within the school or library....” (Emphasis added.)

The lack of eligibility for many or all of the Help Desk services is not a determination that such facilities have no value, but simply that they fail to meet eligibility requirements. Industry information indicates that approximately 20% of a technology implementation can be funded through E-rate eligibility, with the remaining 80% not eligible. (See, for example, paragraph 497 in the “97 Report and Order.)

Network Electronics Funding Request (FRN 648857)

No product and service eligibility issues were apparent in the review of the Network Electronics Statement of Work.

Server Upgrade Funding Request (FRN 648909)

The Statement of Work specifies that up to 90 file servers will be installed. Only 52 locations are specified in the Form 471 as having a 90% shared discounts. Briefing information from the service provider indicates that the applicant erred in the quantity specification, and that the correct number is 52 file servers. Further investigation is

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needed to determine whether the original funding commitment was for file servers at 90 locations, or for file servers at the 52 locations that had a 90% discount.

Web & File Server Funding Request (FRN 648960)

The Statement of Work specifies that up to 90 file servers and up to 90 web servers will be installed. Technical specifications of these servers are identical to the technical specifications of the servers in the previous section of this analysis. Briefing information from the service provider indicates that the applicant erred in the quantity specification, and that the correct number is 52 file servers and 52 web servers. Further investigation is needed to determine whether the original funding commitment was for file servers at 90 locations, or for file servers at the 52 locations that had a 90% discount.

The Statement of Work indicates that proxy, DHCP, and server caching will be provided. Proxy services and caching are not eligible uses. Therefore, the proportion of server functionality providing these ineligible features should be determined and the appropriate ineligible cost calculated.

Network Cabling Funding Request (FRN 648996)

No product and service eligibility issues were apparent in the review of the Network Cabling Statement of Work.

Internet Access Funding Request (FRN #648594)

The Internet Access Statement of Work indicates that high bandwidth access will be provided for up to 90 campuses. Since only 52 locations are a part of the specification for this funding request, this raises the question of whether the funding request is for the 52 sites with a shared discount of 90% only, or whether it also included the additional 39 locations with a shared discount of 78%.

Furthermore, the Statement of Work indicates that "fiber high speed optic cable or other digital media" will be "used for exclusive access to the Internet." The FCC has raised high concern over exclusive access arrangements, and indicates that funding is not to be provided for arrangements that, even if titled a lease of services, reach essentially the same result as a prohibited WAN purchase. Further information is required to make a final determination, including whether a lease-purchase option exists and whether E-rate funds were requested for up-front costs of service provider infrastructure.

CONCLUSION

The analysis above indicates the following:

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- The funding commitment for FRN 648646 should be analyzed to determine which costs are allocable to eligible products and services, and which to ineligible products and services. If no documentation is available, the funding commitment for this FRN should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648729 should undergo cost allocation based on the issues identified in the analysis. The funding commitment will need to be rescinded in part and recovery sought for any amounts disbursed for ineligible products and services.
- The funding commitment for FRN 648758 should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648793 contains substantial ineligible services and must undergo cost allocation.
- The funding commitment for FRNs 648909, 648960, and 648594 should be analyzed to determine whether the funding commitment was limited to 52 locations at a 90% discount. If the funding commitment was not limited to 52 locations, the funding commitment will need to be rescinded in part and recovery sought for any amounts disbursed for products and services delivered to locations that do not qualify for a 90% discount. For FRN 648594, a final eligibility determination needs to be made for fiber exclusive access service.
- The funding commitments for FRNs 648857 and 648996 do not appear to raise eligibility issues.

Exhibit D

EPISD FY2001 Form 471 (No. 256606) and Item 21 Attachment.

Schools and Libraries Universal Service Program Services Ordered and Certification Form 471 Application Display

Block 1: Billed Entity Information

Applicant's Form Identifier: Yr4 - IBM
(90)

471 Application Number: 256606

Cert. Postmark Date: 01/18/2001

Out of Window Letter Date: Not
applicable

Funding Year:

07/01/2001 - 06/30/2002

Form Status: CERTIFIED - In Window

Billed Entity Number:

142118

RAL Date: 02/21/2001

Name: EL PASO INDEP SCHOOL DISTRICT

Address: 6531 BOEING DR

City: EL PASO **State:** TX **Zip:** 79925 1008

Contact Name: Fred Alvarez

Address: El Paso Independent School District, 6531 Boeing Dr.

City: El Paso **State:** TX **Zip:** 79925

Type of Application: SCHOOL DISTRICT

Ineligible Orgs: N

Block 3: Impact of Services Ordered in THIS Application

Number of students to be served: 62702

Number of library patrons to be served:

SERVICE DESCRIPTION	BEFORE ORDER	AFTER ORDER
a. (Schools/districts/consortia only) Telephone service: How many classrooms had phone service before and after your order?	4321	4650
b. High-bandwidth voice/data/video service: How many buildings served before and after your order?	520	531
c. High-bandwidth voice/data/video service: Highest speed to a building before and after your order?	1.544 Mbps	1.544 Mbps
d. Dial-up Internet connections: How many before and after your order?	0	0
e. Dial-up Internet connections: Highest speed before and after your order?	n/a	n/a
f. Direct connections to the Internet: How many before and after your order?	89	100
g. Direct connections to the Internet: Highest speed before and after your order?	1.544 Mbps	1.544 Mbps
h. Internet access(for schools): How many rooms have Internet access before and after your order?	4321	4650
j. Internet Access: How many computers (or other devices) with Internet access before and after your order?	2800	4800

Block 4: Worksheets

Worksheet A No: 283667 **Student Count:** 30291**Weighted Product (Sum. Column 8):** 27120.1**Shared Discount:** 90%

1. School Name: ALAMO ELEMENTARY SCHOOL
2. Entity Number: 92962 **3. Rural/Urban:** Urban
4. Student Count: 298 **5. NSLP Students:** 294 **6. NSLP Students/Students:** 98.657%
7. Discount: 90% **8. Weighted Product:** 268.2

1. School Name: ALTA VISTA ELEMENTARY SCHOOL
2. Entity Number: 92983 **3. Rural/Urban:** Urban
4. Student Count: 601 **5. NSLP Students:** 562 **6. NSLP Students/Students:** 93.510%
7. Discount: 90% **8. Weighted Product:** 540.9

1. School Name: AOY ELEMENTARY SCHOOL
2. Entity Number: 92963 **3. Rural/Urban:** Urban
4. Student Count: 455 **5. NSLP Students:** 446 **6. NSLP Students/Students:** 98.021%
7. Discount: 90% **8. Weighted Product:** 409.5

1. School Name: BASSETT MIDDLE SCHOOL
2. Entity Number: 93130 **3. Rural/Urban:** Urban
4. Student Count: 1067 **5. NSLP Students:** 861 **6. NSLP Students/Students:** 80.693%
7. Discount: 90% **8. Weighted Product:** 960.3

1. School Name: BEALL ELEMENTARY SCHOOL
2. Entity Number: 92997 **3. Rural/Urban:** Urban
4. Student Count: 534 **5. NSLP Students:** 526 **6. NSLP Students/Students:** 98.501%
7. Discount: 90% **8. Weighted Product:** 480.6

1. School Name: BONHAM ELEMENTARY SCHOOL
2. Entity Number: 93097 **3. Rural/Urban:** Urban
4. Student Count: 254 **5. NSLP Students:** 201 **6. NSLP Students/Students:** 79.133%
7. Discount: 90% **8. Weighted Product:** 228.6

1. School Name: BOWIE HIGH SCHOOL
2. Entity Number: 93002 **3. Rural/Urban:** Urban
4. Student Count: 1377 **5. NSLP Students:** 1217 **6. NSLP Students/Students:** 88.380%
7. Discount: 90% **8. Weighted Product:** 1239.3

1. School Name: BURLESON ELEMENTARY SCHOOL
2. Entity Number: 93003 **3. Rural/Urban:** Urban
4. Student Count: 474 **5. NSLP Students:** 467 **6. NSLP Students/Students:** 98.523%
7. Discount: 90% **8. Weighted Product:** 426.6

1. School Name: BURNET ELEMENTARY SCHOOL
2. Entity Number: 92991 **3. Rural/Urban:** Urban
4. Student Count: 436 **5. NSLP Students:** 395 **6. NSLP Students/Students:** 90.596%
7. Discount: 90% **8. Weighted Product:** 392.4

1. **School Name:** CHAPIN HIGH SCHOOL
2. **Entity Number:** 211458 3. **Rural/Urban:** Urban
4. **Student Count:** 388 5. **NSLP Students:** 208 6. **NSLP Students/Students:** 53.608%
7. **Discount:** 80% 8. **Weighted Product:** 310.4

1. **School Name:** CHARLES MIDDLE SCHOOL
2. **Entity Number:** 93077 3. **Rural/Urban:** Urban
4. **Student Count:** 499 5. **NSLP Students:** 351 6. **NSLP Students/Students:** 70.340%
7. **Discount:** 80% 8. **Weighted Product:** 399.2

1. **School Name:** CLARDY ELEMENTARY SCHOOL
2. **Entity Number:** 93006 3. **Rural/Urban:** Urban
4. **Student Count:** 732 5. **NSLP Students:** 659 6. **NSLP Students/Students:** 90.027%
7. **Discount:** 90% 8. **Weighted Product:** 658.8

1. **School Name:** CLENDENIN ELEMENTARY SCHOOL
2. **Entity Number:** 93129 3. **Rural/Urban:** Urban
4. **Student Count:** 480 5. **NSLP Students:** 424 6. **NSLP Students/Students:** 88.333%
7. **Discount:** 90% 8. **Weighted Product:** 432

1. **School Name:** COLDWELL ELEM-INTER SCHOOL
2. **Entity Number:** 92976 3. **Rural/Urban:** Urban
4. **Student Count:** 483 5. **NSLP Students:** 436 6. **NSLP Students/Students:** 90.269%
7. **Discount:** 90% 8. **Weighted Product:** 434.7

1. **School Name:** COLLINS ELEMENTARY SCHOOL
2. **Entity Number:** 93079 3. **Rural/Urban:** Urban
4. **Student Count:** 608 5. **NSLP Students:** 458 6. **NSLP Students/Students:** 75.328%
7. **Discount:** 90% 8. **Weighted Product:** 547.2

1. **School Name:** COOLEY ELEMENTARY SCHOOL
2. **Entity Number:** 92996 3. **Rural/Urban:** Urban
4. **Student Count:** 723 5. **NSLP Students:** 693 6. **NSLP Students/Students:** 95.850%
7. **Discount:** 90% 8. **Weighted Product:** 650.7

1. **School Name:** CROCKETT ELEM & INTER SCHOOL
2. **Entity Number:** 93132 3. **Rural/Urban:** Urban
4. **Student Count:** 708 5. **NSLP Students:** 635 6. **NSLP Students/Students:** 89.689%
7. **Discount:** 90% 8. **Weighted Product:** 637.2

1. **School Name:** CROSBY ELEMENTARY SCHOOL
2. **Entity Number:** 93092 3. **Rural/Urban:** Urban
4. **Student Count:** 611 5. **NSLP Students:** 530 6. **NSLP Students/Students:** 86.743%
7. **Discount:** 90% 8. **Weighted Product:** 549.9

1. **School Name:** Cordova Middle School
2. **Entity Number:** 194340 3. **Rural/Urban:** Urban
4. **Student Count:** 866 5. **NSLP Students:** 767 6. **NSLP Students/Students:** 88.568%
7. **Discount:** 90% 8. **Weighted Product:** 779.4

1. **School Name:** DOUGLASS ELEMENTARY SCHOOL
2. **Entity Number:** 93001 3. **Rural/Urban:** Urban
4. **Student Count:** 512 5. **NSLP Students:** 501 6. **NSLP Students/Students:** 97.851%
7. **Discount:** 90% 8. **Weighted Product:** 460.8

1. **School Name:** DOWELL ELEMENTARY SCHOOL
2. **Entity Number:** 93085 3. **Rural/Urban:** Urban
4. **Student Count:** 357 5. **NSLP Students:** 294 6. **NSLP Students/Students:** 82.352%
7. **Discount:** 90% 8. **Weighted Product:** 321.3

1. **School Name:** EDGAR PARK ELEMENTARY SCHOOL
2. **Entity Number:** 92987 3. **Rural/Urban:** Urban
4. **Student Count:** 501 5. **NSLP Students:** 345 6. **NSLP Students/Students:** 68.862%
7. **Discount:** 80% 8. **Weighted Product:** 400.8

1. **School Name:** FANNIN ELEMENTARY SCHOOL
2. **Entity Number:** 93076 3. **Rural/Urban:** Urban
4. **Student Count:** 677 5. **NSLP Students:** 551 6. **NSLP Students/Students:** 81.388%
7. **Discount:** 90% 8. **Weighted Product:** 609.3

1. **School Name:** GUILLEN MIDDLE SCHOOL
2. **Entity Number:** 92964 3. **Rural/Urban:** Urban
4. **Student Count:** 1028 5. **NSLP Students:** 991 6. **NSLP Students/Students:** 96.400%
7. **Discount:** 90% 8. **Weighted Product:** 925.2

1. **School Name:** HART ELEMENTARY SCHOOL
2. **Entity Number:** 92965 3. **Rural/Urban:** Urban
4. **Student Count:** 476 5. **NSLP Students:** 467 6. **NSLP Students/Students:** 98.109%
7. **Discount:** 90% 8. **Weighted Product:** 428.4

1. **School Name:** HAWKINS ELEMENTARY SCHOOL
2. **Entity Number:** 92992 3. **Rural/Urban:** Urban
4. **Student Count:** 393 5. **NSLP Students:** 360 6. **NSLP Students/Students:** 91.603%
7. **Discount:** 90% 8. **Weighted Product:** 353.7

1. **School Name:** HENDERSON MIDDLE SCHOOL
2. **Entity Number:** 93004 3. **Rural/Urban:** Urban
4. **Student Count:** 1085 5. **NSLP Students:** 1003 6. **NSLP Students/Students:** 92.442%
7. **Discount:** 90% 8. **Weighted Product:** 976.5

1. **School Name:** HIGHLAND SPECIAL EDUC SCHOOL
2. **Entity Number:** 93127 3. **Rural/Urban:** Urban
4. **Student Count:** 30 5. **NSLP Students:** 17 6. **NSLP Students/Students:** 56.666%
7. **Discount:** 80% 8. **Weighted Product:** 24

1. **School Name:** HILLSIDE ELEMENTARY SCHOOL
2. **Entity Number:** 92979 3. **Rural/Urban:** Urban
4. **Student Count:** 695 5. **NSLP Students:** 585 6. **NSLP Students/Students:** 84.172%
7. **Discount:** 90% 8. **Weighted Product:** 625.5

1. **School Name:** HOUSTON ELEM & INTER SCHOOL
2. **Entity Number:** 93128 3. **Rural/Urban:** Urban
4. **Student Count:** 360 5. **NSLP Students:** 330 6. **NSLP Students/Students:** 91.666%
7. **Discount:** 90% 8. **Weighted Product:** 324

1. **School Name:** HUGHEY ELEMENTARY SCHOOL
2. **Entity Number:** 93096 3. **Rural/Urban:** Urban
4. **Student Count:** 681 5. **NSLP Students:** 557 6. **NSLP Students/Students:** 81.791%

7. Discount: 90% **8. Weighted Product:** 612.9

1. School Name: JEFFERSON HIGH SCHOOL
2. Entity Number: 92995 **3. Rural/Urban:** Urban
4. Student Count: 1256 **5. NSLP Students:** 985 **6. NSLP Students/Students:** 78.423%
7. Discount: 90% **8. Weighted Product:** 1130.4

1. School Name: JOHNSON ELEMENTARY SCHOOL
2. Entity Number: 93048 **3. Rural/Urban:** Urban
4. Student Count: 680 **5. NSLP Students:** 603 **6. NSLP Students/Students:** 88.676%
7. Discount: 90% **8. Weighted Product:** 612

1. School Name: JUVENILE DETENTION CENTER
2. Entity Number: 190558 **3. Rural/Urban:** Urban
4. Student Count: 8 **5. NSLP Students:** 8 **6. NSLP Students/Students:** 100.000%
7. Discount: 90% **8. Weighted Product:** 7.2

1. School Name: LAMAR ELEMENTARY SCHOOL
2. Entity Number: 92969 **3. Rural/Urban:** Urban
4. Student Count: 701 **5. NSLP Students:** 673 **6. NSLP Students/Students:** 96.005%
7. Discount: 90% **8. Weighted Product:** 630.9

1. School Name: LEE ELEMENTARY SCHOOL
2. Entity Number: 92989 **3. Rural/Urban:** Urban
4. Student Count: 898 **5. NSLP Students:** 839 **6. NSLP Students/Students:** 93.429%
7. Discount: 90% **8. Weighted Product:** 808.2

1. School Name: LOGAN ELEMENTARY SCHOOL
2. Entity Number: 92990 **3. Rural/Urban:** Urban
4. Student Count: 751 **5. NSLP Students:** 612 **6. NSLP Students/Students:** 81.491%
7. Discount: 90% **8. Weighted Product:** 675.9

1. School Name: MAGOFFIN MIDDLE SCHOOL
2. Entity Number: 92988 **3. Rural/Urban:** Urban
4. Student Count: 957 **5. NSLP Students:** 824 **6. NSLP Students/Students:** 86.102%
7. Discount: 90% **8. Weighted Product:** 861.3

1. School Name: MORENO ELEMENTARY SCHOOL
2. Entity Number: 212141 **3. Rural/Urban:** Urban
4. Student Count: 383 **5. NSLP Students:** 340 **6. NSLP Students/Students:** 88.772%
7. Discount: 90% **8. Weighted Product:** 344.7

1. School Name: NEWMAN ELEMENTARY SCHOOL
2. Entity Number: 93080 **3. Rural/Urban:** Urban
4. Student Count: 678 **5. NSLP Students:** 598 **6. NSLP Students/Students:** 88.200%
7. Discount: 90% **8. Weighted Product:** 610.2

1. School Name: RAYMOND L TELLES ACADEMY
2. Entity Number: 92959 **3. Rural/Urban:** Urban
4. Student Count: 180 **5. NSLP Students:** 135 **6. NSLP Students/Students:** 75.000%
7. Discount: 90% **8. Weighted Product:** 162

1. School Name: ROBERTS ELEMENTARY SCHOOL
2. Entity Number: 93137 **3. Rural/Urban:** Urban

4. Student Count: 850 5. NSLP Students: 764 6. NSLP Students/Students: 89.882%
 7. Discount: 90% 8. Weighted Product: 765

1. School Name: ROOSEVELT ELEMENTARY SCHOOL
 2. Entity Number: 92960 3. Rural/Urban: Urban
 4. Student Count: 356 5. NSLP Students: 352 6. NSLP Students/Students: 98.876%
 7. Discount: 90% 8. Weighted Product: 320.4

1. School Name: RUSK ELEMENTARY SCHOOL
 2. Entity Number: 93133 3. Rural/Urban: Urban
 4. Student Count: 648 5. NSLP Students: 582 6. NSLP Students/Students: 89.814%
 7. Discount: 90% 8. Weighted Product: 583.2

1. School Name: SCHOOL AGE PARENT PROGRAM
 2. Entity Number: 93125 3. Rural/Urban: Urban
 4. Student Count: 95 5. NSLP Students: 75 6. NSLP Students/Students: 78.947%
 7. Discount: 90% 8. Weighted Product: 85.5

1. School Name: SCHUSTER ELEMENTARY SCHOOL
 2. Entity Number: 93088 3. Rural/Urban: Urban
 4. Student Count: 289 5. NSLP Students: 257 6. NSLP Students/Students: 88.927%
 7. Discount: 90% 8. Weighted Product: 260.1

1. School Name: STANTON ELEMENTARY SCHOOL
 2. Entity Number: 93094 3. Rural/Urban: Urban
 4. Student Count: 660 5. NSLP Students: 614 6. NSLP Students/Students: 93.030%
 7. Discount: 90% 8. Weighted Product: 594

1. School Name: TRAVIS ELEMENTARY SCHOOL
 2. Entity Number: 93136 3. Rural/Urban: Urban
 4. Student Count: 477 5. NSLP Students: 422 6. NSLP Students/Students: 88.469%
 7. Discount: 90% 8. Weighted Product: 429.3

1. School Name: VILAS ELEMENTARY SCHOOL
 2. Entity Number: 92970 3. Rural/Urban: Urban
 4. Student Count: 485 5. NSLP Students: 461 6. NSLP Students/Students: 95.051%
 7. Discount: 90% 8. Weighted Product: 436.5

1. School Name: WAINWRIGHT ELEMENTARY SCHOOL
 2. Entity Number: 92986 3. Rural/Urban: Urban
 4. Student Count: 509 5. NSLP Students: 489 6. NSLP Students/Students: 96.070%
 7. Discount: 90% 8. Weighted Product: 458.1

1. School Name: WIGGS MIDDLE SCHOOL
 2. Entity Number: 92974 3. Rural/Urban: Urban
 4. Student Count: 703 5. NSLP Students: 583 6. NSLP Students/Students: 82.930%
 7. Discount: 90% 8. Weighted Product: 632.7

1. School Name: ZAVALA ELEMENTARY SCHOOL
 2. Entity Number: 92994 3. Rural/Urban: Urban
 4. Student Count: 338 5. NSLP Students: 330 6. NSLP Students/Students: 97.633%
 7. Discount: 90% 8. Weighted Product: 304.2

Worksheet A No: 287027 Student Count: 62364

Weighted Product (Sum. Column 8): 48410.6

Shared Discount: 78%

1. **School Name:** ALAMO ELEMENTARY SCHOOL
2. **Entity Number:** 92962 3. **Rural/Urban:** Urban
4. **Student Count:** 298 5. **NSLP Students:** 294 6. **NSLP Students/Students:** 98.657%
7. **Discount:** 90% 8. **Weighted Product:** 268.2

1. **School Name:** ALTA VISTA ELEMENTARY SCHOOL
2. **Entity Number:** 92983 3. **Rural/Urban:** Urban
4. **Student Count:** 601 5. **NSLP Students:** 562 6. **NSLP Students/Students:** 93.510%
7. **Discount:** 90% 8. **Weighted Product:** 540.9

1. **School Name:** ANDRESS HIGH SCHOOL
2. **Entity Number:** 93081 3. **Rural/Urban:** Urban
4. **Student Count:** 2035 5. **NSLP Students:** 841 6. **NSLP Students/Students:** 41.326%
7. **Discount:** 60% 8. **Weighted Product:** 1221

1. **School Name:** AOY ELEMENTARY SCHOOL
2. **Entity Number:** 92963 3. **Rural/Urban:** Urban
4. **Student Count:** 455 5. **NSLP Students:** 446 6. **NSLP Students/Students:** 98.021%
7. **Discount:** 90% 8. **Weighted Product:** 409.5

1. **School Name:** AUSTIN HIGH SCHOOL
2. **Entity Number:** 93135 3. **Rural/Urban:** Urban
4. **Student Count:** 1661 5. **NSLP Students:** 1123 6. **NSLP Students/Students:** 67.609%
7. **Discount:** 80% 8. **Weighted Product:** 1328.8

1. **School Name:** BASSETT MIDDLE SCHOOL
2. **Entity Number:** 93130 3. **Rural/Urban:** Urban
4. **Student Count:** 1067 5. **NSLP Students:** 861 6. **NSLP Students/Students:** 80.693%
7. **Discount:** 90% 8. **Weighted Product:** 960.3

1. **School Name:** BEALL ELEMENTARY SCHOOL
2. **Entity Number:** 92997 3. **Rural/Urban:** Urban
4. **Student Count:** 534 5. **NSLP Students:** 526 6. **NSLP Students/Students:** 98.501%
7. **Discount:** 90% 8. **Weighted Product:** 480.6

1. **School Name:** BLISS ELEMENTARY SCHOOL
2. **Entity Number:** 93007 3. **Rural/Urban:** Urban
4. **Student Count:** 833 5. **NSLP Students:** 616 6. **NSLP Students/Students:** 73.949%
7. **Discount:** 80% 8. **Weighted Product:** 666.4

1. **School Name:** BONHAM ELEMENTARY SCHOOL
2. **Entity Number:** 93097 3. **Rural/Urban:** Urban
4. **Student Count:** 254 5. **NSLP Students:** 201 6. **NSLP Students/Students:** 79.133%
7. **Discount:** 90% 8. **Weighted Product:** 228.6

1. **School Name:** BOWIE HIGH SCHOOL
2. **Entity Number:** 93002 3. **Rural/Urban:** Urban
4. **Student Count:** 1377 5. **NSLP Students:** 1217 6. **NSLP Students/Students:** 88.380%
7. **Discount:** 90% 8. **Weighted Product:** 1239.3

1. **School Name:** BRADLEY ELEMENTARY SCHOOL
2. **Entity Number:** 93073 3. **Rural/Urban:** Urban
4. **Student Count:** 663 5. **NSLP Students:** 471 6. **NSLP Students/Students:** 71.040%

7. Discount: 80% **8. Weighted Product:** 530.4

1. School Name: BURGESS HIGH SCHOOL
2. Entity Number: 93100 **3. Rural/Urban:** Urban
4. Student Count: 1429 **5. NSLP Students:** 783 **6. NSLP Students/Students:** 54.793%
7. Discount: 80% **8. Weighted Product:** 1143.2

1. School Name: BURLESON ELEMENTARY SCHOOL
2. Entity Number: 93003 **3. Rural/Urban:** Urban
4. Student Count: 474 **5. NSLP Students:** 467 **6. NSLP Students/Students:** 98.523%
7. Discount: 90% **8. Weighted Product:** 426.6

1. School Name: BURNET ELEMENTARY SCHOOL
2. Entity Number: 92991 **3. Rural/Urban:** Urban
4. Student Count: 436 **5. NSLP Students:** 395 **6. NSLP Students/Students:** 90.596%
7. Discount: 90% **8. Weighted Product:** 392.4

1. School Name: CANYON HILLS MIDDLE SCHOOL
2. Entity Number: 92984 **3. Rural/Urban:** Urban
4. Student Count: 906 **5. NSLP Students:** 643 **6. NSLP Students/Students:** 70.971%
7. Discount: 80% **8. Weighted Product:** 724.8

1. School Name: CENTER FOR CAREER & TECH ED
2. Entity Number: 93124 **3. Rural/Urban:** Urban
4. Student Count: 0 **5. NSLP Students:** 0 **6. NSLP Students/Students:**
7. Discount: 20% **8. Weighted Product:** 0

1. School Name: CHAPIN HIGH SCHOOL
2. Entity Number: 211458 **3. Rural/Urban:** Urban
4. Student Count: 388 **5. NSLP Students:** 208 **6. NSLP Students/Students:** 53.608%
7. Discount: 80% **8. Weighted Product:** 310.4

1. School Name: CHARLES MIDDLE SCHOOL
2. Entity Number: 93077 **3. Rural/Urban:** Urban
4. Student Count: 499 **5. NSLP Students:** 351 **6. NSLP Students/Students:** 70.340%
7. Discount: 80% **8. Weighted Product:** 399.2

1. School Name: CIELO VISTA ELEMENTARY SCHOOL
2. Entity Number: 93101 **3. Rural/Urban:** Urban
4. Student Count: 279 **5. NSLP Students:** 115 **6. NSLP Students/Students:** 41.218%
7. Discount: 60% **8. Weighted Product:** 167.4

1. School Name: CLARDY ELEMENTARY SCHOOL
2. Entity Number: 93006 **3. Rural/Urban:** Urban
4. Student Count: 732 **5. NSLP Students:** 659 **6. NSLP Students/Students:** 90.027%
7. Discount: 90% **8. Weighted Product:** 658.8

1. School Name: CLENDENIN ELEMENTARY SCHOOL
2. Entity Number: 93129 **3. Rural/Urban:** Urban
4. Student Count: 480 **5. NSLP Students:** 424 **6. NSLP Students/Students:** 88.333%
7. Discount: 90% **8. Weighted Product:** 432

1. School Name: COLDWELL ELEM-INTER SCHOOL
2. Entity Number: 92976 **3. Rural/Urban:** Urban

4. Student Count: 483 5. NSLP Students: 436 6. NSLP Students/Students: 90.269%
 7. Discount: 90% 8. Weighted Product: 434.7

1. School Name: COLLINS ELEMENTARY SCHOOL
 2. Entity Number: 93079 3. Rural/Urban: Urban
 4. Student Count: 608 5. NSLP Students: 458 6. NSLP Students/Students: 75.328%
 7. Discount: 90% 8. Weighted Product: 547.2

1. School Name: COOLEY ELEMENTARY SCHOOL
 2. Entity Number: 92996 3. Rural/Urban: Urban
 4. Student Count: 723 5. NSLP Students: 693 6. NSLP Students/Students: 95.850%
 7. Discount: 90% 8. Weighted Product: 650.7

1. School Name: CORONADO HIGH SCHOOL
 2. Entity Number: 93044 3. Rural/Urban: Urban
 4. Student Count: 2405 5. NSLP Students: 613 6. NSLP Students/Students: 25.488%
 7. Discount: 50% 8. Weighted Product: 1202.5

1. School Name: CROCKETT ELEM & INTER SCHOOL
 2. Entity Number: 93132 3. Rural/Urban: Urban
 4. Student Count: 708 5. NSLP Students: 635 6. NSLP Students/Students: 89.689%
 7. Discount: 90% 8. Weighted Product: 637.2

1. School Name: CROSBY ELEMENTARY SCHOOL
 2. Entity Number: 93092 3. Rural/Urban: Urban
 4. Student Count: 611 5. NSLP Students: 530 6. NSLP Students/Students: 86.743%
 7. Discount: 90% 8. Weighted Product: 549.9

1. School Name: Cordova Middle School
 2. Entity Number: 194340 3. Rural/Urban: Urban
 4. Student Count: 866 5. NSLP Students: 767 6. NSLP Students/Students: 88.568%
 7. Discount: 90% 8. Weighted Product: 779.4

1. School Name: DOUGLASS ELEMENTARY SCHOOL
 2. Entity Number: 93001 3. Rural/Urban: Urban
 4. Student Count: 512 5. NSLP Students: 501 6. NSLP Students/Students: 97.851%
 7. Discount: 90% 8. Weighted Product: 460.8

1. School Name: DOWELL ELEMENTARY SCHOOL
 2. Entity Number: 93085 3. Rural/Urban: Urban
 4. Student Count: 357 5. NSLP Students: 294 6. NSLP Students/Students: 82.352%
 7. Discount: 90% 8. Weighted Product: 321.3

1. School Name: DR. MANUEL D. HORNEDO MIDDLE SCHOOL
 2. Entity Number: 93050 3. Rural/Urban: Urban
 4. Student Count: 1566 5. NSLP Students: 330 6. NSLP Students/Students: 21.072%
 7. Discount: 50% 8. Weighted Product: 783

1. School Name: ED CENTER BOEING
 2. Entity Number: 225258 3. Rural/Urban: Urban
 4. Student Count: 0 5. NSLP Students: 0 6. NSLP Students/Students:
 7. Discount: 20% 8. Weighted Product: 0

1. School Name: ED CENTER DOWNTOWN

2. Entity Number: 225257 **3. Rural/Urban:** Urban
4. Student Count: 0 **5. NSLP Students:** 0 **6. NSLP Students/Students:**
7. Discount: 20% **8. Weighted Product:** 0

1. School Name: EDGAR PARK ELEMENTARY SCHOOL
2. Entity Number: 92987 **3. Rural/Urban:** Urban
4. Student Count: 501 **5. NSLP Students:** 345 **6. NSLP Students/Students:** 68.862%
7. Discount: 80% **8. Weighted Product:** 400.8

1. School Name: EL PASO HIGH SCHOOL
2. Entity Number: 92973 **3. Rural/Urban:** Urban
4. Student Count: 1216 **5. NSLP Students:** 815 **6. NSLP Students/Students:** 67.023%
7. Discount: 80% **8. Weighted Product:** 972.8

1. School Name: FANNIN ELEMENTARY SCHOOL
2. Entity Number: 93076 **3. Rural/Urban:** Urban
4. Student Count: 677 **5. NSLP Students:** 551 **6. NSLP Students/Students:** 81.388%
7. Discount: 90% **8. Weighted Product:** 609.3

1. School Name: Franklin High School
2. Entity Number: 194341 **3. Rural/Urban:** Urban
4. Student Count: 2496 **5. NSLP Students:** 510 **6. NSLP Students/Students:** 20.432%
7. Discount: 50% **8. Weighted Product:** 1248

1. School Name: GREEN ELEMENTARY SCHOOL
2. Entity Number: 93049 **3. Rural/Urban:** Urban
4. Student Count: 568 **5. NSLP Students:** 284 **6. NSLP Students/Students:** 50.000%
7. Discount: 80% **8. Weighted Product:** 454.4

1. School Name: GUERRERO ELEMENTARY SCHOOL
2. Entity Number: 93035 **3. Rural/Urban:** Urban
4. Student Count: 861 **5. NSLP Students:** 424 **6. NSLP Students/Students:** 49.245%
7. Discount: 60% **8. Weighted Product:** 516.6

1. School Name: GUILLEN MIDDLE SCHOOL
2. Entity Number: 92964 **3. Rural/Urban:** Urban
4. Student Count: 1028 **5. NSLP Students:** 991 **6. NSLP Students/Students:** 96.400%
7. Discount: 90% **8. Weighted Product:** 925.2

1. School Name: HART ELEMENTARY SCHOOL
2. Entity Number: 92965 **3. Rural/Urban:** Urban
4. Student Count: 476 **5. NSLP Students:** 467 **6. NSLP Students/Students:** 98.109%
7. Discount: 90% **8. Weighted Product:** 428.4

1. School Name: HAWKINS ELEMENTARY SCHOOL
2. Entity Number: 92992 **3. Rural/Urban:** Urban
4. Student Count: 393 **5. NSLP Students:** 360 **6. NSLP Students/Students:** 91.603%
7. Discount: 90% **8. Weighted Product:** 353.7

1. School Name: HENDERSON MIDDLE SCHOOL
2. Entity Number: 93004 **3. Rural/Urban:** Urban
4. Student Count: 1085 **5. NSLP Students:** 1003 **6. NSLP Students/Students:** 92.442%
7. Discount: 90% **8. Weighted Product:** 976.5

1. **School Name:** HIGHLAND SPECIAL EDUC SCHOOL
2. **Entity Number:** 93127 3. **Rural/Urban:** Urban
4. **Student Count:** 30 5. **NSLP Students:** 17 6. **NSLP Students/Students:** 56.666%
7. **Discount:** 80% 8. **Weighted Product:** 24

1. **School Name:** HILLSIDE ELEMENTARY SCHOOL
2. **Entity Number:** 92979 3. **Rural/Urban:** Urban
4. **Student Count:** 695 5. **NSLP Students:** 585 6. **NSLP Students/Students:** 84.172%
7. **Discount:** 90% 8. **Weighted Product:** 625.5

1. **School Name:** HOUSTON ELEM & INTER SCHOOL
2. **Entity Number:** 93128 3. **Rural/Urban:** Urban
4. **Student Count:** 360 5. **NSLP Students:** 330 6. **NSLP Students/Students:** 91.666%
7. **Discount:** 90% 8. **Weighted Product:** 324

1. **School Name:** HUGHEY ELEMENTARY SCHOOL
2. **Entity Number:** 93096 3. **Rural/Urban:** Urban
4. **Student Count:** 681 5. **NSLP Students:** 557 6. **NSLP Students/Students:** 81.791%
7. **Discount:** 90% 8. **Weighted Product:** 612.9

1. **School Name:** IRVIN HIGH SCHOOL
2. **Entity Number:** 93091 3. **Rural/Urban:** Urban
4. **Student Count:** 1873 5. **NSLP Students:** 1188 6. **NSLP Students/Students:** 63.427%
7. **Discount:** 80% 8. **Weighted Product:** 1498.4

1. **School Name:** JAMES GAMBLE CENTER
2. **Entity Number:** 225260 3. **Rural/Urban:** Urban
4. **Student Count:** 0 5. **NSLP Students:** 0 6. **NSLP Students/Students:**
7. **Discount:** 20% 8. **Weighted Product:** 0

1. **School Name:** JEFFERSON HIGH SCHOOL
2. **Entity Number:** 92995 3. **Rural/Urban:** Urban
4. **Student Count:** 1256 5. **NSLP Students:** 985 6. **NSLP Students/Students:** 78.423%
7. **Discount:** 90% 8. **Weighted Product:** 1130.4

1. **School Name:** JOHNSON ELEMENTARY SCHOOL
2. **Entity Number:** 93048 3. **Rural/Urban:** Urban
4. **Student Count:** 680 5. **NSLP Students:** 603 6. **NSLP Students/Students:** 88.676%
7. **Discount:** 90% 8. **Weighted Product:** 612

1. **School Name:** JUVENILE DETENTION CENTER
2. **Entity Number:** 190558 3. **Rural/Urban:** Urban
4. **Student Count:** 8 5. **NSLP Students:** 8 6. **NSLP Students/Students:** 100.000%
7. **Discount:** 90% 8. **Weighted Product:** 7.2

1. **School Name:** KOHLBERG ELEMENTARY SCHOOL
2. **Entity Number:** 93034 3. **Rural/Urban:** Urban
4. **Student Count:** 1172 5. **NSLP Students:** 211 6. **NSLP Students/Students:** 18.003%
7. **Discount:** 40% 8. **Weighted Product:** 468.8

1. **School Name:** LAMAR ELEMENTARY SCHOOL
2. **Entity Number:** 92969 3. **Rural/Urban:** Urban
4. **Student Count:** 701 5. **NSLP Students:** 673 6. **NSLP Students/Students:** 96.005%
7. **Discount:** 90% 8. **Weighted Product:** 630.9

1. **School Name:** LEE ELEMENTARY SCHOOL
2. **Entity Number:** 92989 3. **Rural/Urban:** Urban
4. **Student Count:** 898 5. **NSLP Students:** 839 6. **NSLP Students/Students:** 93.429%
7. **Discount:** 90% 8. **Weighted Product:** 808.2

1. **School Name:** LINCOLN MIDDLE SCHOOL
2. **Entity Number:** 93138 3. **Rural/Urban:** Urban
4. **Student Count:** 1017 5. **NSLP Students:** 472 6. **NSLP Students/Students:** 46.411%
7. **Discount:** 60% 8. **Weighted Product:** 610.2

1. **School Name:** LINDBERGH ELEMENTARY SCHOOL
2. **Entity Number:** 93139 3. **Rural/Urban:** Urban
4. **Student Count:** 703 5. **NSLP Students:** 289 6. **NSLP Students/Students:** 41.109%
7. **Discount:** 60% 8. **Weighted Product:** 421.8

1. **School Name:** LOGAN ELEMENTARY SCHOOL
2. **Entity Number:** 92990 3. **Rural/Urban:** Urban
4. **Student Count:** 751 5. **NSLP Students:** 612 6. **NSLP Students/Students:** 81.491%
7. **Discount:** 90% 8. **Weighted Product:** 675.9

1. **School Name:** MACARTHUR ELEM-MIDDLE SCHOOL
2. **Entity Number:** 93102 3. **Rural/Urban:** Urban
4. **Student Count:** 839 5. **NSLP Students:** 465 6. **NSLP Students/Students:** 55.423%
7. **Discount:** 80% 8. **Weighted Product:** 671.2

1. **School Name:** MAGOFFIN MIDDLE SCHOOL
2. **Entity Number:** 92988 3. **Rural/Urban:** Urban
4. **Student Count:** 957 5. **NSLP Students:** 824 6. **NSLP Students/Students:** 86.102%
7. **Discount:** 90% 8. **Weighted Product:** 861.3

1. **School Name:** MESITA ELEMENTARY SCHOOL
2. **Entity Number:** 92968 3. **Rural/Urban:** Urban
4. **Student Count:** 535 5. **NSLP Students:** 339 6. **NSLP Students/Students:** 63.364%
7. **Discount:** 80% 8. **Weighted Product:** 428

1. **School Name:** MILAM ELEMENTARY SCHOOL
2. **Entity Number:** 93033 3. **Rural/Urban:** Urban
4. **Student Count:** 199 5. **NSLP Students:** 56 6. **NSLP Students/Students:** 28.140%
7. **Discount:** 50% 8. **Weighted Product:** 99.5

1. **School Name:** MOREHEAD MIDDLE SCHOOL
2. **Entity Number:** 93047 3. **Rural/Urban:** Urban
4. **Student Count:** 1169 5. **NSLP Students:** 612 6. **NSLP Students/Students:** 52.352%
7. **Discount:** 80% 8. **Weighted Product:** 935.2

1. **School Name:** MORENO ELEMENTARY SCHOOL
2. **Entity Number:** 212141 3. **Rural/Urban:** Urban
4. **Student Count:** 383 5. **NSLP Students:** 340 6. **NSLP Students/Students:** 88.772%
7. **Discount:** 90% 8. **Weighted Product:** 344.7

1. **School Name:** NEWMAN ELEMENTARY SCHOOL
2. **Entity Number:** 93080 3. **Rural/Urban:** Urban
4. **Student Count:** 678 5. **NSLP Students:** 598 6. **NSLP Students/Students:** 88.200%

7. Discount: 90% **8. Weighted Product:** 610.2

1. School Name: NIXON ELEMENTARY SCHOOL
2. Entity Number: 93140 **3. Rural/Urban:** Urban
4. Student Count: 833 **5. NSLP Students:** 317 **6. NSLP Students/Students:** 38.055%
7. Discount: 60% **8. Weighted Product:** 499.8

1. School Name: OCCUPATIONAL CENTER
2. Entity Number: 201673 **3. Rural/Urban:** Urban
4. Student Count: 0 **5. NSLP Students:** 0 **6. NSLP Students/Students:**
7. Discount: 20% **8. Weighted Product:** 0

1. School Name: POLK ELEMENTARY SCHOOL
2. Entity Number: 93039 **3. Rural/Urban:** Urban
4. Student Count: 771 **5. NSLP Students:** 102 **6. NSLP Students/Students:** 13.229%
7. Discount: 40% **8. Weighted Product:** 308.4

1. School Name: PUTNAM ELEMENTARY SCHOOL
2. Entity Number: 93046 **3. Rural/Urban:** Urban
4. Student Count: 540 **5. NSLP Students:** 381 **6. NSLP Students/Students:** 70.555%
7. Discount: 80% **8. Weighted Product:** 432

1. School Name: RAYMOND L TELLES ACADEMY
2. Entity Number: 92959 **3. Rural/Urban:** Urban
4. Student Count: 180 **5. NSLP Students:** 135 **6. NSLP Students/Students:** 75.000%
7. Discount: 90% **8. Weighted Product:** 162

1. School Name: RIVERA ELEMENTARY SCHOOL
2. Entity Number: 93041 **3. Rural/Urban:** Urban
4. Student Count: 573 **5. NSLP Students:** 314 **6. NSLP Students/Students:** 54.799%
7. Discount: 80% **8. Weighted Product:** 458.4

1. School Name: ROBERTS ELEMENTARY SCHOOL
2. Entity Number: 93137 **3. Rural/Urban:** Urban
4. Student Count: 850 **5. NSLP Students:** 764 **6. NSLP Students/Students:** 89.882%
7. Discount: 90% **8. Weighted Product:** 765

1. School Name: ROOSEVELT ELEMENTARY SCHOOL
2. Entity Number: 92960 **3. Rural/Urban:** Urban
4. Student Count: 356 **5. NSLP Students:** 352 **6. NSLP Students/Students:** 98.876%
7. Discount: 90% **8. Weighted Product:** 320.4

1. School Name: ROSS MIDDLE SCHOOL
2. Entity Number: 93095 **3. Rural/Urban:** Urban
4. Student Count: 757 **5. NSLP Students:** 540 **6. NSLP Students/Students:** 71.334%
7. Discount: 80% **8. Weighted Product:** 605.6

1. School Name: RUSK ELEMENTARY SCHOOL
2. Entity Number: 93133 **3. Rural/Urban:** Urban
4. Student Count: 648 **5. NSLP Students:** 582 **6. NSLP Students/Students:** 89.814%
7. Discount: 90% **8. Weighted Product:** 583.2

1. School Name: Richardson Middle School
2. Entity Number: 194345 **3. Rural/Urban:** Urban

4. Student Count: 771 **5. NSLP Students:** 321 **6. NSLP Students/Students:** 41.634%
7. Discount: 60% **8. Weighted Product:** 462.6

1. School Name: SAN JACINTO ADULT SCHOOL
2. Entity Number: 92958 **3. Rural/Urban:** Urban
4. Student Count: 0 **5. NSLP Students:** 0 **6. NSLP Students/Students:**
7. Discount: 20% **8. Weighted Product:** 0

1. School Name: SCHOOL AGE PARENT PROGRAM
2. Entity Number: 93125 **3. Rural/Urban:** Urban
4. Student Count: 95 **5. NSLP Students:** 75 **6. NSLP Students/Students:** 78.947%
7. Discount: 90% **8. Weighted Product:** 85.5

1. School Name: SCHUSTER ELEMENTARY SCHOOL
2. Entity Number: 93088 **3. Rural/Urban:** Urban
4. Student Count: 289 **5. NSLP Students:** 257 **6. NSLP Students/Students:** 88.927%
7. Discount: 90% **8. Weighted Product:** 260.1

1. School Name: SILVA HEALTH MAGNET SCHOOL
2. Entity Number: 93000 **3. Rural/Urban:** Urban
4. Student Count: 743 **5. NSLP Students:** 406 **6. NSLP Students/Students:** 54.643%
7. Discount: 80% **8. Weighted Product:** 594.4

1. School Name: STANTON ELEMENTARY SCHOOL
2. Entity Number: 93094 **3. Rural/Urban:** Urban
4. Student Count: 660 **5. NSLP Students:** 614 **6. NSLP Students/Students:** 93.030%
7. Discount: 90% **8. Weighted Product:** 594

1. School Name: SUNSET HIGH SCHOOL
2. Entity Number: 93126 **3. Rural/Urban:** Urban
4. Student Count: 243 **5. NSLP Students:** 57 **6. NSLP Students/Students:** 23.456%
7. Discount: 50% **8. Weighted Product:** 121.5

1. School Name: TERRACE HILLS MIDDLE SCHOOL
2. Entity Number: 93078 **3. Rural/Urban:** Urban
4. Student Count: 714 **5. NSLP Students:** 492 **6. NSLP Students/Students:** 68.907%
7. Discount: 80% **8. Weighted Product:** 571.2

1. School Name: TRAVIS ELEMENTARY SCHOOL
2. Entity Number: 93136 **3. Rural/Urban:** Urban
4. Student Count: 477 **5. NSLP Students:** 422 **6. NSLP Students/Students:** 88.469%
7. Discount: 90% **8. Weighted Product:** 429.3

1. School Name: VILAS ELEMENTARY SCHOOL
2. Entity Number: 92970 **3. Rural/Urban:** Urban
4. Student Count: 485 **5. NSLP Students:** 461 **6. NSLP Students/Students:** 95.051%
7. Discount: 90% **8. Weighted Product:** 436.5

1. School Name: WAINWRIGHT ELEMENTARY SCHOOL
2. Entity Number: 92986 **3. Rural/Urban:** Urban
4. Student Count: 509 **5. NSLP Students:** 489 **6. NSLP Students/Students:** 96.070%
7. Discount: 90% **8. Weighted Product:** 458.1

1. School Name: WESTERN HILLS ELEM SCHOOL

2. Entity Number: 93042 3. Rural/Urban: Urban
 4. Student Count: 441 5. NSLP Students: 165 6. NSLP Students/Students: 37.414%
 7. Discount: 60% 8. Weighted Product: 264.6

1. School Name: WHITAKER ELEMENTARY SCHOOL
 2. Entity Number: 93093 3. Rural/Urban: Urban
 4. Student Count: 612 5. NSLP Students: 424 6. NSLP Students/Students: 69.281%
 7. Discount: 80% 8. Weighted Product: 489.6

1. School Name: WHITE ELEMENTARY SCHOOL
 2. Entity Number: 93072 3. Rural/Urban: Urban
 4. Student Count: 650 5. NSLP Students: 295 6. NSLP Students/Students: 45.384%
 7. Discount: 60% 8. Weighted Product: 390

1. School Name: WIGGS MIDDLE SCHOOL
 2. Entity Number: 92974 3. Rural/Urban: Urban
 4. Student Count: 703 5. NSLP Students: 583 6. NSLP Students/Students: 82.930%
 7. Discount: 90% 8. Weighted Product: 632.7

1. School Name: ZAVALA ELEMENTARY SCHOOL
 2. Entity Number: 92994 3. Rural/Urban: Urban
 4. Student Count: 338 5. NSLP Students: 330 6. NSLP Students/Students: 97.633%
 7. Discount: 90% 8. Weighted Product: 304.2

Block 5: Discount Funding Request(s)

FRN: 648594 FCDL Date: 09/28/2001	
11. Category of Service: Internet Access	12. 470 Application Number: 780530000302800
13. SPIN: 143005607	14. Service Provider Name: International Business Machines Corporation
15. Contract Number: RFP# 101-00	16. Billing Account Number:
17. Allowable Contract Date: 11/28/2000	18. Contract Award Date: 01/09/2001
19a. Service Start Date: 07/01/2001	19b. Service End Date:
20. Contract Expiration Date: 06/30/2002	
21. Attachment #: FIA	22. Block 4 Worksheet No.: 283667
23a. Monthly Charges: \$301,500.00	23b. Ineligible monthly amt.: \$.00
23c. Eligible monthly amt.: \$301,500.00	23d. Number of months of service: 12
23e. Annual pre-discount amount for eligible recurring charges (23c x 23d): \$3,618,000.00	
23f. Annual non-recurring (one-time) charges: 1118700	23g. Ineligible non-recurring amt.: 745800
23h. Annual pre-discount amount for eligible non-recurring charges (23f - 23g): \$372,900.00	
23i. Total program year pre-discount amount (23e + 23h): \$3,990,900.00	
23j. % discount (from Block 4): 90	
23k. Funding Commitment Request (23i x 23j): \$3,591,810.00	

FRN: 648646 FCDL Date: 09/28/2001	
11. Category of Service: Internal Connections	12. 470 Application Number: 278530000321216
13. SPIN: 143005607	14. Service Provider Name: International Business Machines Corporation
15. Contract Number: RFP# 101-00	16. Billing Account Number:
17. Allowable Contract Date: 01/01/2001	18. Contract Award Date: 01/09/2001
19a. Service Start Date: 07/01/2001	19b. Service End Date:
20. Contract Expiration Date: 06/30/2002	
21. Attachment #: EM	22. Block 4 Worksheet No.: 283667
23a. Monthly Charges: \$.00	23b. Ineligible monthly amt.: \$.00
23c. Eligible monthly amt.: \$0.00	23d. Number of months of service: 12
23e. Annual pre-discount amount for eligible recurring charges (23c x 23d): \$0.00	
23f. Annual non-recurring (one-time) charges: 3591600	23g. Ineligible non-recurring amt.: 72949.3
23h. Annual pre-discount amount for eligible non-recurring charges (23f - 23g): \$3,518,650.70	
23i. Total program year pre-discount amount (23e + 23h): \$3,518,650.70	
23j. % discount (from Block 4): 90	
23k. Funding Commitment Request (23i x 23j): \$3,166,785.63	

FRN: 648729 FCDL Date: 09/28/2001	
11. Category of Service: Internal Connections	12. 470 Application Number: 278530000321216
13. SPIN: 143005607	14. Service Provider Name: International Business Machines Corporation
15. Contract Number: RFP# 101-00	16. Billing Account Number:
17. Allowable Contract Date: 01/01/2001	18. Contract Award Date: 01/09/2001
19a. Service Start Date: 07/01/2001	19b. Service End Date:
20. Contract Expiration Date: 06/30/2002	
21. Attachment #: V	22. Block 4 Worksheet No.: 283667
23a. Monthly Charges: \$.00	23b. Ineligible monthly amt.: \$.00
23c. Eligible monthly amt.: \$0.00	23d. Number of months of service: 12
23e. Annual pre-discount amount for eligible recurring charges (23c x 23d): \$0.00	
23f. Annual non-recurring (one-time) charges: 4374054	23g. Ineligible non-recurring amt.: 37950
23h. Annual pre-discount amount for eligible non-recurring charges (23f - 23g): \$4,336,104.00	
23i. Total program year pre-discount amount (23e + 23h): \$4,336,104.00	
23j. % discount (from Block 4): 90	
23k. Funding Commitment Request (23i x 23j): \$3,902,493.60	

FRN: 648758 FCDL Date: 09/28/2001	
11. Category of Service: Internal Connections	12. 470 Application Number: 278530000321216
13. SPIN: 143005607	14. Service Provider Name: International Business Machines Corporation
15. Contract Number: RFP# 101-00	16. Billing Account Number:
17. Allowable Contract Date: 01/01/2001	18. Contract Award Date: 01/09/2001
19a. Service Start Date: 07/01/2001	19b. Service End Date:
20. Contract Expiration Date: 06/30/2002	

21. Attachment #: WA	22. Block 4 Worksheet No.: 283667
23a. Monthly Charges: \$.00	23b. Ineligible monthly amt.: \$.00
23c. Eligible monthly amt.: \$0.00	23d. Number of months of service: 12
23e. Annual pre-discount amount for eligible recurring charges (23c x 23d): \$0.00	
23f. Annual non-recurring (one-time) charges: 2825700	23g. Ineligible non-recurring amt.: 95669
23h. Annual pre-discount amount for eligible non-recurring charges (23f - 23g): \$2,730,031.00	
23i. Total program year pre-discount amount (23e + 23h): \$2,730,031.00	
23j. % discount (from Block 4): 90	
23k. Funding Commitment Request (23i x 23j): \$2,457,027.90	

FRN: 648793 FCDL Date: 09/28/2001	
11. Category of Service: Internal Connections	12. 470 Application Number: 278530000321216
13. SPIN: 143005607	14. Service Provider Name: International Business Machines Corporation
15. Contract Number: RFP# 101-00	16. Billing Account Number:
17. Allowable Contract Date: 01/01/2001	18. Contract Award Date: 01/09/2001
19a. Service Start Date: 07/01/2001	19b. Service End Date:
20. Contract Expiration Date: 06/30/2002	
21. Attachment #: M	22. Block 4 Worksheet No.: 283667
23a. Monthly Charges: \$.00	23b. Ineligible monthly amt.: \$.00
23c. Eligible monthly amt.: \$0.00	23d. Number of months of service: 12
23e. Annual pre-discount amount for eligible recurring charges (23c x 23d): \$0.00	
23f. Annual non-recurring (one-time) charges: 27121700	23g. Ineligible non-recurring amt.: 0
23h. Annual pre-discount amount for eligible non-recurring charges (23f - 23g): \$27,121,700.00	
23i. Total program year pre-discount amount (23e + 23h): \$27,121,700.00	
23j. % discount (from Block 4): 90	
23k. Funding Commitment Request (23i x 23j): \$24,409,530.00	

FRN: 648857 FCDL Date: 09/28/2001	
11. Category of Service: Internal Connections	12. 470 Application Number: 278530000321216
13. SPIN: 143005607	14. Service Provider Name: International Business Machines Corporation
15. Contract Number: RFP# 101-00	16. Billing Account Number:
17. Allowable Contract Date: 01/01/2001	18. Contract Award Date: 01/09/2001
19a. Service Start Date: 07/01/2001	19b. Service End Date:
20. Contract Expiration Date: 06/30/2002	
21. Attachment #: NE	22. Block 4 Worksheet No.: 283667
23a. Monthly Charges: \$.00	23b. Ineligible monthly amt.: \$.00
23c. Eligible monthly amt.: \$0.00	23d. Number of months of service: 12
23e. Annual pre-discount amount for eligible recurring charges (23c x 23d): \$0.00	
23f. Annual non-recurring (one-time) charges: 11636600	23g. Ineligible non-recurring amt.: 0
23h. Annual pre-discount amount for eligible non-recurring charges (23f - 23g): \$11,636,600.00	
23i. Total program year pre-discount amount (23e + 23h): \$11,636,600.00	

23j. % discount (from Block 4): 90
23k. Funding Commitment Request (23i x 23j): \$10,472,940.00

FRN: 648909 FCDL Date: 09/28/2001	
11. Category of Service: Internal Connections	12. 470 Application Number: 278530000321216
13. SPIN: 143005607	14. Service Provider Name: International Business Machines Corporation
15. Contract Number: RFP# 101-00	16. Billing Account Number:
17. Allowable Contract Date: 01/01/2001	18. Contract Award Date: 01/09/2001
19a. Service Start Date: 07/01/2001	19b. Service End Date:
20. Contract Expiration Date: 06/30/2002	
21. Attachment #: SU	22. Block 4 Worksheet No.: 283667
23a. Monthly Charges: \$.00	23b. Ineligible monthly amt.: \$.00
23c. Eligible monthly amt.: \$0.00	23d. Number of months of service: 12
23e. Annual pre-discount amount for eligible recurring charges (23c x 23d): \$0.00	
23f. Annual non-recurring (one-time) charges: 2919700	23g. Ineligible non-recurring amt.: 0
23h. Annual pre-discount amount for eligible non-recurring charges (23f - 23g): \$2,919,700.00	
23i. Total program year pre-discount amount (23e + 23h): \$2,919,700.00	
23j. % discount (from Block 4): 90	
23k. Funding Commitment Request (23i x 23j): \$2,627,730.00	

FRN: 648960 FCDL Date: 09/28/2001	
11. Category of Service: Internal Connections	12. 470 Application Number: 278530000321216
13. SPIN: 143005607	14. Service Provider Name: International Business Machines Corporation
15. Contract Number: RFP# 101-00	16. Billing Account Number:
17. Allowable Contract Date: 01/01/2001	18. Contract Award Date: 01/09/2001
19a. Service Start Date: 07/01/2001	19b. Service End Date:
20. Contract Expiration Date: 06/30/2002	
21. Attachment #: W/FS	22. Block 4 Worksheet No.: 283667
23a. Monthly Charges: \$.00	23b. Ineligible monthly amt.: \$.00
23c. Eligible monthly amt.: \$0.00	23d. Number of months of service: 12
23e. Annual pre-discount amount for eligible recurring charges (23c x 23d): \$0.00	
23f. Annual non-recurring (one-time) charges: 6500600	23g. Ineligible non-recurring amt.: 0
23h. Annual pre-discount amount for eligible non-recurring charges (23f - 23g): \$6,500,600.00	
23i. Total program year pre-discount amount (23e + 23h): \$6,500,600.00	
23j. % discount (from Block 4): 90	
23k. Funding Commitment Request (23i x 23j): \$5,850,540.00	

FRN: 648996 FCDL Date: 09/28/2001	
11. Category of Service: Internal Connections	12. 470 Application Number: 278530000321216
13. SPIN: 143005607	14. Service Provider Name: International Business Machines Corporation

15. Contract Number: RFP# 101-00	16. Billing Account Number:
17. Allowable Contract Date: 01/01/2001	18. Contract Award Date: 01/09/2001
19a. Service Start Date: 07/01/2001	19b. Service End Date:
20. Contract Expiration Date: 06/30/2002	
21. Attachment #: NC	22. Block 4 Worksheet No.: 283667
23a. Monthly Charges: \$.00	23b. Ineligible monthly amt.: \$.00
23c. Eligible monthly amt.: \$0.00	23d. Number of months of service: 12
23e. Annual pre-discount amount for eligible recurring charges (23c x 23d): \$0.00	
23f. Annual non-recurring (one-time) charges: 7867400	23g. Ineligible non-recurring amt.: 0
23h. Annual pre-discount amount for eligible non-recurring charges (23f - 23g): \$7,867,400.00	
23i. Total program year pre-discount amount (23e + 23h): \$7,867,400.00	
23j. % discount (from Block 4): 90	
23k. Funding Commitment Request (23i x 23j): \$7,080,660.00	

Block 6: Certifications and Signature

24a. Schools: Y
24b. Libraries or Library Consortia: N

26a. Individual Technology Plan: Y
26b. Higher-Level Technology Plan(s): N
26c. No Technology Plan Needed:

27a. Approved Technology Plan(s): N
27b. State Approved Technology Plan: Y
27c. No Technology Plan Needed:

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Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
Contact Person: Yinuo Du Phone Number: 915-834-5198

Attachment #SU

Server Upgrades

Vendor: IBM Corporation

The objective of this task is to configure and install Ninety (90), IBM NetFinity Servers with Operating Software Novell 5.0 NetWare. This project includes:

1. Provide Hardware and Operating Software as listed in below
2. Deliver each Server to its designated location
3. Install IBM server hardware
4. Perform power on system test
5. Attach server to the existing Ethernet network and configure network
6. Install Operational Software Novell 5.0 server and implement NDS

Qty	Mfg Part #	Description
		Hardware
90	865821Y	NETFINITY 5600 P3-866MHz, 256MB RAM
90	19K0564	IBM Server Raid 3L Ultra 2 Adapter
180	37L7204	18.2GB SCSI ULTRA WIDE HOT SWAP HDD
90	33L3060	256MB RDIMM ECC 133Mhz
90	65464AN	15IN/13.7V 28MM 1024X768 85HZ Gray/Blk
90	SUI400NE T	1400VA Line Int LAN 7-Full 21-Half UPS

All equipment will have the following Operating Software:

- Operational Software - Novell 5.0 Server 250 User - P/N 239297 (Qty 90)

TOTAL CHARGES:

\$2,919,700.00

Entity Number: 142118

Application Form Identifier: Yr 4-IBM (90)

Contact Person: Yinuo Du

Phone Number: 915-834-5198

Attachment #W/FS

Web / File Servers

Vendor: **IBM Corporation**

The objective of this task is to configure and install Ninety (90) Web Servers and Ninety (90) File Servers, with Operating Software. This project includes:

1. Provide Hardware and Operating Software as listed below
2. Deliver each Server to its designated location.
3. Install IBM server hardware
4. Perform power on system test
5. Attach server to the existing Ethernet network and configure network.
6. Install Operational Software Windows NT on ninety (90) of Web Servers and Operational Software Novell 5.0 on ninety (90) File Servers

Qty	Mfg. Part #	Description
Server Hardware		
180	865821Y	NETFINITY 5600 P3-866MHz, 256MB RAM
180	19K0564	IBM Server Raid 3L Ultra 2 Adapter
360	37L7204	18.2GB SCSI ULTRA WIDE HOT SWAP HDD
180	33L3060	256MB RDIMM ECC 133Mhz
180	65464AN	15IN/13.7V 28MM 1024X768 85HZ Gray/Blk
90	SUI400NE T	1400VA Line Int LAN 7-Full 2I-Half UPS

All equipment will have the following Operating Software:

- ☐ Operational Software - Windows NT Server - P/N 279-476587 (Qty 90)
- ☐ Operational Software - Novell 5.0 Server 100 User- P/N 238296 (Qty 90)

TOTAL CHARGES:

\$6,500,600.00

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
 Contact Person: Yinuo Du Phone Number: 915-834-5198

Attachment #NC

Network Cabling

Vendor: IBM Corporation

This project includes installation of Category 5 cabling drops to work station areas, Main and Intermediate Distribution Frames, Network Electronics, peripheral equipment needed to complete Network Cabling requirements for cabling of classrooms and labs.

<u>RESOURCES</u>	<u>Unit Price</u>
New MDF	\$ 3,290.00
New IDF	\$ 3,290.00
Connect Campus MDF to Campus IDF	\$ 9,689.00
MDF to IDF Interconnect/TIE (turn-key)	\$ 15,132.00
Wiring a LAB, 10 drop, inside wall	\$ 2,960.00
Wiring a LAB, 20 drop, inside wall	\$ 5,921.00
Wiring a LAB, 30 drop, inside wall	\$ 7,237.00
Wiring a LAB, 40 drop, inside wall	\$ 8,553.00
Wiring a LAB, 10 drop, outside wall	\$ 4,276.00
Wiring a LAB, 20 drop, outside wall	\$ 6,185.00
Wiring a LAB, 30 drop, outside wall	\$ 7,500.00
Wiring a LAB, 40 drop, outside wall	\$ 8,815.00
Dual Drop Add (1-10)	\$ 428.00
Dual Drop Add (11-24)	\$ 388.00
Dual Drop Add (25- >)	\$ 362.00
Composite Drop Add (1-10)	\$ 730.00
Composite Drop Add (11-24)	\$ 691.00
Composite Drop Add (25- >)	\$ 658.00
Data Drop Add (1-10)	\$ 257.00
Data Drop Add (11-24)	\$ 244.00
Data Drop Add (25- >)	\$ 230.00
Rack mounted, 24 port modular patch panel	\$ 125.00
19" x 3' swingout rack	\$ 460.00
Installation cost	\$ 53.00
Move composite drop	\$ 362.00

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
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Cost of Termination	\$	1,974.00
Cost per foot (fiber or copper)	\$	19.75
Wire new portable to existing portable IDF		
Cost of Termination	\$	625.00
Cost per foot	\$	5.90
Wall Cabinet 22"x3ft. W/fan/wLock	\$	1,178.00
MDF Cabinet w/Lock/wfan	\$	2,362.00
Primary Protector	\$	823.00
Wiremold 2700 series Installed (per foot)	\$	3.75
Wiremold 2800 series Installed (per foot)	\$	4.28
Wiremold 2900 series Installed (per foot)	\$	5.60

TOTAL CHARGES: \$7,867,400.00

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
 Contact Person: Yinuo Du Phone Number: 915-834-5198

Attachment #NE

Network Electronics

Vendor: IBM Corporation

IBM will provide, install and test connectivity to the LAN Equipment listed below.

Cisco 6509/3508/3548 Switches		
PRODUCT NO.	DESCRIPTION	QTY
WS-C5509-S3-E3	Catalyst 5509 with Supervisor III NFFC II, one AC Power Supply	25
SFC5K-SUP3-4.3.1	Catalyst 5509 Supervisor 3 Flash Image Release 4.3.1	25
SWC5K-BEFS-4X	Catalyst 5000 Rel. 4x SW License, Enhanced Feature Set	25
WS-U5534-GESX-BU	Dual Port 1000BaseSX Uplink module for Supervisor III	25
WS-X5225R	24 Port 10/100TX Backbone Switching (FEC, 802.1Q/ISL, RJ-45)	75
WS-X5403	C5000 Gigabit Ethernet Switch Module w/o GBICs (3 Port)	25
WS-G5484	1000Base-SX Short Wavelength GIBC	75
CON-SNT-WS-C5505	SNT Service, Catalyst 5509, 9 Slot	25
WS-F5541	Catalyst 5000 Route Switch Module Feature Card for Sup II G & III G	85
WS-C3548-XL-EN	48 Port 10/100Tx plus 2-GBIC Ports Enterprise	500
WS-X3500	Gigastack GBIC and Cable	500
WS-G3508G-XL-EN	8 Port 1000Base GBIC Switch Enterprise	85
WS-X3500	Gigastack GBIC and Cable	85
WS-G5484	1000BaseSX GBIC	85
WS-C3512-XL-EN	12 Port 10/100Tx plus 2-GBIC Ports Enterprise	500
WS-C6509	Cisco Catalyst Switch	2

TOTAL CHARGES:

\$11,636,600.00

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
Contact Person: Yinuo Du Phone Number: 915-834-5198

Attachment #M

EPISD USF Maintenance Services

Vendor: IBM Corporation

IBM Global Services' contract with EPISD is a Total Systems Maintenance (TSM) customized maintenance solution that supplements El Paso Independent School District's IT organization by taking on the operational maintenance tasks. IBM will provide the people, processes, and tools to keep EPISD in peak performance mode with minimal down time. Dedicated on-site resources will support the functioning of local area network, wide area network, and connectivity among buildings including maintenance and repair of hardware and operational software systems. The maintenance resources will resolve user calls relating to internal connections maintenance of hardware (hubs, routers, switches, and servers), operational software maintenance, configuration and test for end-to-end connectivity, documentation for eligible equipment, servers, installation, and maintenance.

IBM will provide network maintenance support to EPISD, a District that has some 63,000 students, 4,000 classrooms, and 88 campuses and over 15,000 computers. Maintenance cost for the District's large network can be illustrated in the following manner.

A) Network Maintenance Support:

At El Paso Independent School District we recognize that we must maintain a high level of support with the maintenance we are providing. At EPISD we understand the complex environment that we support today and will support in the future to include some of the following characteristics:

The Maintenance Support Office (MSO) will:

- Provide support Monday - Friday, 8:00-5:00, 52 weeks per year
- Provide tracking and logging of problems during working hours
- Prioritize problems calls and dispatched support
- Develop and maintain Maintenance Support Office operational procedures including, but not limited to, call prioritization guidelines and escalation procedures
- Initiate a Problem Management Record (PMR) to document service outages. A PMR may include information such as date and time opened, description of symptoms, problem assignment (Level 1/Level 2), problem status, and final resolution

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
Contact Person: Yinuo Du Phone Number: 915-834-5198

- Record, analyze, and report on calls received by the MSO including:
 - Call volumes and duration
 - Problem trends
 - Call abandon rate
 - Problem resolution time
 - And other reports mutually agreed to by IBM and EPISD using available data
- Interface with and coordinate problem determination and resolution with EPISD's appropriate support personnel and third party services providers
- Perform periodic problem reviews for root cause analysis and, in conjunction with EPISD, establish appropriate measures to prevent recurring incidents
- Hold regularly scheduled internal status meetings on open problems
- Schedule technician activities
- Accept incoming support related calls from end users
- Perform initial problem determination
- Perform appropriate level of technical support
- Dispatch support resources, as necessary
- Call users to verify EPISD personnel are prepared for technicians arrival, for scheduled activities
- Work with EPISD to develop documentation related to proper networking operations.
- Create and distribute technical documentation for technicians
- Provide technical resources with a consistent level of support, including appropriate documentation, throughout project duration
- Attend process improvement meetings
- Provide a monthly Maintenance Support Office activity report
- Perform appropriate 'hand-off' of out of scope work functions (i.e. PC workstation warranty work)
- Report out of scope activities to project office for proactive interaction with EPISD resources to minimize future occurrences
- Assist in the resolution of in scope functions via telephone support or on-site network related support through problem resolution
- Dispatch dedicated maintenance field technical resources and track activities through network problem resolution

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Contact Person: Yinuo Du Phone Number: 915-834-5198

Dedicated onsite resources to support the functioning of local area network and connectivity among buildings including maintenance and repair of hardware and operational software systems for the term of the Agreement. The maintenance resources will be assigned tasks by the district that will include, but is not limited to: User calls relating to internal connections maintenance of hardware (hubs, routers, switches, servers), operational software maintenance, configuration and test for end to end connectivity, documentation for eligible equipment, service, installation and maintenance.

B) Internal Connections Hardware Maintenance:

Description	Quantity
Servers IBM Netfinity 7000 IBM Netfinity 8500	100
Switches Cisco 2900 Series Cisco 5500 Series	6000
Routers Cisco 3800 Series Cisco 7513 Series	100

Total One-time charges for Maintenance: \$ 27,121,700.00

Entity Number: 142118Application Form Identifier: Yr 4-IBM (90)Contact Person: Yinuo DuPhone Number: 915-834-5198

Attachment #WA

Web Access

Vendor: IBM Corporation

IBM will provide the following internal connections equipment and associated documentation :

Product	Description	Qty
7046-B50	RS/6000 Model B50	4
	375 MHz 604e PowerPC Processor	4
	1.44MB 3.5-in Diskette Drive	4
	Integrated Ultra SCSI Adapter	4
	Integrated Ethernet Adapter	4
	Standard Mounting Rails	4
0009	Final Light Manufacture	4
2624	32x Speed CD-ROM Drive	4
2830	POWER GXT130P Graphics Adapter (PCI)	8
3112	9.1 GB Ultra SCSI Disk	4
3752	Service Package	16
4169	256 MB SDRAM DIMM, 168 Pin	4
4951	4-port 10/100 Mbps Ethernet Adapter	4
7305	AAP Preinstall - SDF Ship	4
9300	Language - English (US)	4
9911	Rack Power Cord - ALL IBM Racks, 4m	4
7014-T42	Enterprise Rack - 42 EIA	1
6081	Front Trim Kit for 2.0m Rack, Black	1
6098	Side Panel for 1.8 or 2.0m Rack, Black	2
9171	Power Distribution Unit, Side-Mount, 1 Phase	1
9300	Language - English (US)	1
9800	Rack Power Cord - US/Canada	1

Product	Description	Qty
5765-C34	AIX Version 4	4
4061	AIX 4.3	4
7305	Preinstall Final Light Manufacture Indicator	4
9001	Asset Registration	4

4

Entry Number: 142118 Application Form Identifier: Yr 4-IBM (90)
 Contact Person: Yinuo Du Phone Number: 915-834-5198

0598 AIX Welcome Center	4
0838 AIX 4.3 Update CD	4
0857 AIX 4.3	4
0859 Preinstall AIX 4.3 Server Bundle	4
0860 AIX 4.3 Bonus Pack - Non Export.	4
1004 CD-ROM Process Charge	4
2924 English	4
3410 CD-ROM	4
5924 AIX 4.3 PII - English	4
7305 Preinstall Final Light Manufacture Indicator	4
9001 Asset Registration	4

Product	Description	Qty
SB032 S995	IBM Education Card Attend unlimited Education and Training public classes or conferences 1 yr, Student specific	1
HW/INTG	Hardware and Software Integration Standard load of UNIX operating sys, Memory, Storage devices, I/O adapters, Device drivers and load device.	1
RS6000	ServiceSuite Advanced Included 36 mths 24x7 Extended Hardware Maintenance, 36 mths, 24x7 Software Support, System Alert	1

Product Covered:
 7046-B50 x 4, 7014-T42
 Systems OS

P/N	Qty	Description
866471Y	3	IBM Netfinity 5600 933 MHz/256KB, 256MB ECC, OPEN, 40X, PCI
	1	(Std) CD-ROM Drive Internal 40X-17X (Variable Speed)
	1	(Std) IBM 1.44MB 3.5-inch Diskette Drive
	1	(Std) IBM 104-key Keyboard (Stealth Black)
	1	(Std) Integrated 10/100 Ethernet Controller
	1	(Std) Mouse Stealth Black
	2	(Std) Netfinity 250W Hot-Swap Redundant Power Supply
	1	(Std) Netfinity 256MB SDRAM ECC RDIMM (133MHz)

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
Contact Person: Yinuo Du Phone Number: 915-834-5198

	1	(Std) Netfinity 933 MHz 133 FSB/256KB Pentium III Processor
	1	(Std) Planar Integrated Wide Ultra2 LVD SCSI -Internal
	1	(Std) Planar Integrated Wide Ultra2 LVD SCSI for External Devices
	1	(Std) Processor Complex Card
	1	(Std) S3 Trio3D Video Controller - 4MB
	1	(Std) Systems Management Processor
37L7205	3	Netfinity 18.2GB 10K-4 Ultra160 SCSI Hot-Swap SL HDD
19K4631	1	Netfinity 933 MHz 133 FSB/256KB Pentium III Processor
33L3060	2	Netfinity 256MB 133MHz SDRAM ECC RDIMM
37L6091	1	Netfinity ServerRAID-4L Ultra160 SCSI Controller
00N7991	1	IBM 20/40GB DDS/4 4-mm Internal Tape Drive
36L9636	1	Netfinity Two-Drop Internal SCSI Cable
6331B2N	1	E54 - 15(13.8) in. UV-NH Color Monitor, 69 kHz (MPRII), Stealth Black
94G3136	1	APC Smart-UPS 1400

Operational Software:

Windows NT 4.0 with Service Pack 4 or above is required for the server.

Total One Time Cost : \$2,825,700.00

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
Contact Person: Yinuo Du Phone Number: 915-834-5198

Attachment #V

Video Group Equipment

Vendor: IBM Corporation

The Cisco video group equipment is used to control the programming, distribution and selection of video conferencing.

Name	Model	Quantity
Cisco IP/TV Broadcast Server	3423	2
Cisco IP/TV Control Server	3411	2
Cisco IP/TV Viewer Software (Free)		14,000
Cisco IP/TV Viewer Software (Fee with MPEG2)		14,000

Cisco Content Distribution Manager 4650

1. One 866-MHz Pentium III Xeon microprocessor
2. Front side bus (FSB) with an external bus speed of 133 MHz
3. 1 GB of system memory SDRAM
4. Eight 18-GB SCSI hard disk drives
5. Three independent power supplies
6. Hot-pluggable fans that run independently
7. The CDM-4650 manages up to 1000 Content Engines and has the following software features:
 - Device manager with remote software update capability
 - Channel manager licensed for 100 channels
 - Bandwidth manager
 - Media importer with Web page creation capability
 - Media previewer with test streaming capability
 - Media replication engine with Self-Organizing Distributed Architecture (SODA)
 - router
 - Replica router for Content Engine selection .

Cisco Content Engine 507

1. TV-quality streaming media
2. Advanced transparent caching service
3. Powerful Employee Internet Management (EIM)

Name	Model	Quantity
------	-------	----------

Entity Number: 142118 Application Form Identifier: Vr 4-IBM (90)
Contact Person: Yinuo Du Phone Number: 915-834-5198

• FVC.COM Codec V-Station

FVCC.COM's V-Station is a Codec and associated equipment used to control distribution, selection of video broadcast with integrated, high performance video networking system with full-featured interactive and streaming video support.

CODEC SPECIFICATIONS -

1. Call Types: H.320 switched over ATM (H.321). Standard telephone (voice).
2. Call Control: Caller ID, idle call disconnect, dynamic call bandwidth, communication call status, speed dial, comprehensive phone book, call forward and transfer.
3. Audio: Automatic device selection, level indicators, automated gain control, noise suppression, full duplex echo cancellation at -60db.
4. Video Standards: H.281 far end camera control, image control, still capture/restore.
5. Audio Standards: G.711 A Law and U Law, G.722, G.728 Frequency Response: 300 Hz to 7.1 KHz for G.722, 300 Hz to 3.4 KHz for G.711 and G.728 Video Outputs: VGA up to 1280 x 1024 at 72 Hz refresh rate, 16.7 million colors, separate self view, RS232 camera control, dual monitor option
6. Frame Rate: 15 fps at CIF, 352 x 288 pixels, 30 fps at QCIF, 176 x 144 pixels, still image CIF transfer
7. Room Quality: Low delay, 225 ms end-to-end, room quality at 384Kbps to 1920Kbps

• FVC.COM V-Gate 4000 Gateway

SCALABLE VIDEOCONFERENCING GATEWAY FOR IP, ISDN, AND/OR ATM -

1. The V-Gate 4000 is a scalable, multi-protocol gateway that enables seamless videoconferencing between IP (H.323) standards, ISDN (H.320) and ATM (H.321).
2. Extends videoconferencing from high-end room systems to desktop. Scalable configurations suit your needs now and in the future.
3. Network intelligence improves efficiency and reduces costs.

- Size: 7" H x 17 1/2" W x 18" D (177.8mm x 431.8mm x 457.2mm)
- Weight: 37 lbs. (16.78 kilograms)
- Mounting: Desktop or 19-inch rack (482.6mm)
- Power Requirements: 100 V AC -240 V AC/47-63 Hz
- Maximum Power Consumption: 250 watts

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
Contact Person: Yinuo Du Phone Number: 915-834-5198

- Storage Temperature: -20° to 65° C
- Relative Humidity: 20% to 80%, non-condensing
- FVC.COM – V-Conference SP
 1. The V-Conference SP is a fault-tolerant, multi-point conference bridge with the scalability required by service providers and large enterprise customers
 2. Designed for high availability and simplified maintenance
 3. Highest capacity MCU on the market
 4. Drag-and-drop management features and auto-adaptive transcoding

SPECIFICATIONS -

- Data Rate: 56Kbps to 1920Kbps
- Network Services/Interfaces: T1/E1, ISDN PRI, ISDN BRI, ATM OC-3
- Clocking: Synchronizes to external network
- Conference Control: Director selection, ITU-T H.243 chair control, voice-activated selection
- Diagnostics: 6B, audio, audio/video, digital, IMUX, internal, network interface, tone, and video loopback

STANDARDS -

- Communications: H.221, H.242, H.243 chair control, H.231, H.261 for end camera control
- Audio: G.711, G.722, G.728
- Data: H.243, LSD, T.122/T.125 (MCS), T.123, T.124 (GCC)
- Video: H.321, H.320, H.261, H.263

Quantities:

Name	Model	Quantity
FVC.COM – V-Gate 4000 Gateway	VGS- 4100-11	2
FVC.COM – V-Conference SP	VCU-SP152/8	1
FVC.COM Codec V-Station	BVS-012	144

Total one time charges \$4,374,054.00

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
Contact Person: Yinuo Du Phone Number: 915-834-5198

Attachment #EM.

E-Mail

Vendor: IBM Corporation

IBM will provide the file servers, operational software, installation, support and maintenance involved in implementing E-Mail for El Paso Independent School District.

Hardware and Operational Software Configuration

7026-H80 RS/6000 Enterprise Server Model H80	1
1.44MB 3.5-in Diskette Drive	1
Integrated SCSI-2 F/W Adapter	2
Integrated Ultra2 SCSI Adapter	1
Integrated Ethernet Adapter	1
0009 Final Light Manufacture	1
2624 32x Speed CD-ROM	1
2830 POWER GXT130P Graphics Adapter (PCI)	1
2968 10/100 Mbps Ethernet PCI Adapter	1
2975 10/100/1000 Base-T Ethernet PCI Adapter	1
3027 9.1 GB 10K RPM Ultra SCSI Disk Drive	2
3142 Remote I/O Cable - 3m	2
4075 Memory Board, 16-position	1
4119 512 MB (2x256MB) SDRAM DIMMs	4
5204 4-Way RS64 III 450 MHz Processor Card,	1
4MB L2 Cache	
5992 System Control and Initialization Cable	1
6132 CEC to Primary I/O Drawer Power Control	1
Cable, 3m	
6159 12GB/24GB 4mm Tape Drive	1
6204 Universal Ultra SCSI Differential	1
Adapter	
6324 Primary I/O Drawer, 5 EIA	1
6540 IPL Disk Mounting Hardware, Cables,	1
Terminator	
7305 AAP Preinstall - SDF Ship	1
9172 AC Power Specify	1
9300 Language - English (US)	1
7014-T42 Enterprise Rack - 42 EIA	1
0128 Content : 7026-H80 (5 EIA)	1
0175 Content: 7316-TF1 (3 EIA)	1
0176 Content: FC 6324 (5 EIA)	1

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
 Contact Person: Yinuo Du Phone Number: 915-834-5198

6098 Side Panel for 1.8 or 2.0m Rack, Black	2
9171 Power Distribution Unit, Side-Mount, 1 Phase	1
9300 Language - English (US)	1
9800 Rack Power Cord - US/Canada	1
7316-TF1 Flat Panel Color Monitor (T54A)	1
0002 Light Manufacturing Order Indicator	1
4242 6-foot Extender Cable for Displays	1
6050 Space Saver 2 Keyboard - US English	1
9900 4m Power Cord- US/Canada	1
9910-A30 APC 5000VA Smart-UPS Rack-Mount	1

Product	Description	Qty
5765-C34 AIX Version 4		1
4061 AIX 4.3		1
7305 Preinstall Final Light Manufacture Indicator		1
9001 Asset Registration		1
5692-AIX System Software		1
0598 AIX Welcome Center		1
0838 AIX 4.3 Update CD		1
0857 AIX 4.3		1
0859 Preinstall AIX 4.3 Server Bundle		1
0860 AIX 4.3 Bonus Pack - Non Export.		1
1004 CD-ROM Process Charge		1
2924 English		1
3410 CD-ROM		1
5924 AIX 4.3 PII - English		1
7305 Preinstall Final Light Manufacture Indicator		1
9001 Asset Registration		1

Product	Description	Qty
7026-M80 RS/6000 Enterprise Server Model M80		1
1.44MB 3.5-in Diskette Drive		1
Integrated SCSI-2 F/W Adapter		1
Integrated Ultra2 SCSI Adapter		1
Integrated Ethernet Adapter		1
0009 Final Light Manufacture		1
2624 32x Speed CD-ROM		1
2830 POWER GXT130P Graphics Adapter (PCI)		1
2868 10/100 Mbps Ethernet PCI Adapter		1

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
 Contact Person: Yinuo Du Phone Number: 915-834-5198

4073 Memory Board, 32-position	1
4133 1024 MB Memory (8x128MB DIMMs)	2
5200 2-Way RS64 III 500MHz Processor Card,	1
4MB L2 Cache	
5992 System Control and Initialization Cable	1
6132 CEC to Primary I/O Drawer Power Control	1
Cable, 3m	
6196 76A Processor Power Regulator	1
6205 PCI Dual Channel Ultra2 SCSI Adapter	1
6230 Advanced SerialRAID Plus Adapter	1
6235 32 MB Fast-Write Cache Option Card	1
6283 Redundant AC Power Supply, I/O Drawer,	1
595W	
6284 Redundant AC Power Supply, CEC, 1100W	1
6324 Primary I/O Drawer, 5 EIA	1
6540 IPL Disk Mounting Hardware, Cables,	1
Terminator	
7305 AAP Preinstall - SDF Ship	1
9172 AC Power Specify	1
9300 Language - English (US)	1
3580-L11 Ultrium External Drive	1
8001 Ultrium Data Cartridge	4
8002 Ultrium Cleaning Cartridge	1
9600 Attached to RS/6000 System	1
9703 2.5m VHDCI to HD68 SCSI Cable	1
9800 2.7m Power Cord 125V, 15A - U.S./Canada	1
7014-T42 Enterprise Rack - 42 EIA	1
0129 Content : 7026-M80 (8 EIA)	2
0156 Content : 7133-D40 (4 EIA)	1
0176 Content : FC 6324 (5 EIA)	2
0183 Content : 9910-A30 (5 EIA)	1
6081 Front Trim Kit for 2.0m Rack, Black	1
6086 Suite Attach Kit for 2.0m Rack, Black	1
6098 Side Panel for 1.8 or 2.0m Rack, Black	2
6171 Additional Power Distribution Unit,	1
Side-Mount, 1 Phase	
9171 Power Distribution Unit, Side-Mount, 1	1
Phase	
9300 Language - English (US)	1
9800 Rack Power Cord - US/Canada	1
7133-D40 Advanced SSA Disk Subsystem	1

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
 Contact Person: Yinuo Du Phone Number: 915-834-5198

8518 One 10K/18.2GB Advanced Disk Drive	16
Module	2
8802 2.5m Advanced SSA Cable	4
8805 5m Advanced SSA Cable	1
9300 Language - English (US)	
9910-A30 APC 5000VA Smart-UPS Rack-Mount	1

Product	Description	Qty
5765-C34 AIX Version 4		1
4061 AIX 4.3		1
7305 Preinstall Final Light Manufacture		1
Indicator		
9001 Asset Registration		1
5692-AIX System Software		1
0598 AIX Welcome Center		1
0838 AIX 4.3 Update CD		1
0857 AIX 4.3		1
0859 Preinstall AIX 4.3 Server Bundle		1
0860 AIX 4.3 Bonus Pack - Non Export.		1
1004 CD-ROM Process Charge		1
2924 English		1
3410 CD-ROM		1
5924 AIX 4.3 PII - English		1
7305 Preinstall Final Light Manufacture		
Indicator		1
9001 Asset Registration		

Product	Description	Qty
7026-M80 RS/6000 Enterprise Server Model M80		1
1.44MB 3.5-in Diskette Drive		1
Integrated SCSI-2 F/W Adapter		1
Integrated Ultra2 SCSI Adapter		1
Integrated Ethernet Adapter		1
2624 32x Speed CD-ROM		1
2830 POWER GXT130P Graphics Adapter (PCI)		1
2968 10/100 Mbps Ethernet PCI Adapter		1
2975 10/100/1000 Base-T Ethernet PCI Adapter		2
3027 9.1 GB 10K RPM Ultra SCSI Disk Drive		2
3142 Remote I/O Cable - 3m		1

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
 Contact Person: Vinuo Du Phone Number: 915-834-5198

4MB L2 Cache	1
5992 System Control and Initialization Cable	1
6132 CEC to Primary I/O Drawer Power Control Cable, 3m	1
6196 76A Processor Power Regulator	1
6230 Advanced SerialRAID Plus Adapter	1
6235 32 MB Fast-Write Cache Option Card	1
6283 Redundant AC Power Supply, I/O Drawer, 595W	1
6284 Redundant AC Power Supply, CEC, 1100W	1
6324 Primary I/O Drawer, 5 EIA	1
6540 IPL Disk Mounting Hardware, Cables, Terminator	1
9172 AC Power Specify	1
9300 Language - English (US)	1

Product	Description	Qty
License		
5765-C34 AIX Version 4		1
4061 AIX 4.3		1
5005 Preinstall		1
9001 Asset Registration		1
5692-AIX System Software		1
0598 AIX Welcome Center		1
0838 AIX 4.3 Update CD		1
0857 AIX 4.3		1
0859 Preinstall AIX 4.3 Server Bundle		1
0860 AIX 4.3 Bonus Pack - Non Export.		1
1004 CD-ROM Process Charge		1
2924 English		1
3410 CD-ROM		1
5005 Preinstall		1
5924 AIX 4.3 PII - English		1
9001 Asset Registration		1

Product	Description	Qty
7046-B50 RS/6000 Model B50		4
375 MHz 604e PowerPC Processor		4
1.44MB 3.5-in Diskette Drive		4
Integrated Ultra SCSI Adapter		4
Integrated Ethernet Adapter		4
Standard Mounting Rails		4
2624 32x Speed CD-ROM Drive		4
POWER OPTION Graphics Adapter (PCI)		4

Entity Number: 142118 Application Form Identifier: Yr 4-IBM (90)
 Contact Person: Yinuo Du Phone Number: 915-834-5198

4951 4-port 10/100 Mbps Ethernet Adapter	4
5005 Preinstall	4
9300 Language - English (US)	4
9911 Rack Power Cord - ALL IBM Racks, 4m	4

Product	Description	Qty
5765-C34	AIX Version 4	4
4061	AIX 4.3	4
5005	Preinstall	4
9001	Asset Registration	4

5692-AIX	System Software	4
0598	AIX Welcome Center	4
0838	AIX 4.3 Update CD	4
0857	AIX 4.3	4
0859	Preinstall AIX 4.3 Server Bundle	4
0860	AIX 4.3 Bonus Pack - Non Export.	4
1004	CD-ROM Process Charge	4
2924	English	4
3410	CD-ROM	4
5005	Preinstall	4
5924	AIX 4.3 PII - English	4
9001	Asset Registration	4

Product	Description	Qty
94G7445	8-port Console Server Selector Switch	1

Additional Services

Product	Description	Qty
HW/INTG	Hardware and Software Integration	1
	Standard load of UNIX operating sys, Memory, Storage devices, I/O adapters, Device drivers and load device.	

Product Covered:

7026-H80, 7316-TF1, 7026-M80 X 2,
 7133-D40, 7014-T42 X 2, 7046-B50 x 4
 9910-A30 X 2, All System OS

Total One Time Charges:

\$3,591,600.00

Entity Number: 142118

Application Form Identifier: Yr 4-IBM (90)

Contact Person: Yinuo Du

Phone Number: 915-834-5198

Attachment #FIA

El Paso Independent School District's Attachment to Form 471 for Exclusive
Fiber Network Internet Access

Vendor: IBM Corporation

IBM will lease either fiber high-speed optic cable or other digital media which provide
the EPISD with exclusive access to the Internet :

One time Non-recurring Charge : \$1,118,700.00

Monthly Charges :\$301,500

Annual Charge :\$3,618,000

Exhibit E

Funding Commitment Decision Letter (Sept. 28, 2001) (“FCDL”).



Universal Service Administrative Company
Schools & Libraries Division

FUNDING COMMITMENT DECISION LETTER
(Funding Year 4: 07/01/2001 - 06/30/2002)

September 28, 2001

EL PASO INDEP SCHOOL DISTRICT
Jack S. Johnston
120 N. Stanton
El Paso, TX 79901

Re: Form 471 Application Number: 256606
Funding Year 4: 07/01/2001 - 06/30/2002
Billed Entity Number: 142118

Thank you for your 2001-2002 E-rate application and for any assistance you provided throughout our review. We have completed review of your Form 471. This letter is to advise you of our decision(s).

FUNDING COMMITMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Report for the Form 471 application cited above. We have reviewed each Discount Funding Request on your Form 471 application and have assigned a Funding Request Number (FRN) to each Block 5. The enclosed report includes a list of the FRNs from your application. The SLD is also sending this information to your service provider(s) so preparations can be made to begin implementing your E-rate discount(s) upon the filing of your Form 486. Immediately preceding the Funding Commitment Report, you will find a guide that defines each line of the Report.

NEXT STEPS

Once you have reviewed this letter and have determined that some or all of your requests have been funded, your next step to facilitate receipt of discounts as featured in this letter will be to file an FCC Form 486 with the SLD. The Form 486 notifies the SLD to begin payment to your service provider and provides certified indication that your technology plan(s) has been approved. The Form 486 and instructions can be found on the SLD web site at www.sl.universalservice.org or you can call the SLD Client Service Bureau at 1-888-203-8100 and ask that the form be sent to you. The new Form 486, dated July 2001 in the lower right corner, MUST be used for Funding Year 4 and for any previous funding years once it becomes available. Subsequent submissions of earlier versions of the Form 486 will be returned to you and will not be able to be processed. As you complete Form 486, you should also contact your service provider to verify they have received notice from the SLD of your funding commitments. After the SLD processes your Form 486, we can begin processing invoices from your service provider(s) so they can be reimbursed for discounted services they have provided you.

On December 21, 2000, the Children's Internet Protection Act was signed into law. That law will require schools and libraries that receive Universal Service discounts for certain services to adopt an Internet safety policy incorporating the use of filtering or blocking technology on computers with Internet access as a condition of receiving those discounts. THE LAW DOES NOT, HOWEVER, REQUIRE THIS TO BE IN PLACE FOR FUNDING YEAR 4. RECIPIENTS WILL HAVE TO CERTIFY, HOWEVER, THAT THEY ARE UNDERTAKING SUCH ACTIONS, INCLUDING NECESSARY PROCUREMENT PROCEDURES, TO PUT SUCH TECHNOLOGY PROTECTION MEASURES IN PLACE. For Funding Year 4 (the Funding Year beginning July 1, 2001), Billed Entities filing Form(s) 486 may encounter one or more situations that will affect their filing deadline(s). See the requirements for Funding Year 4 below and the Form 486

Box 125 - Correspondence Unit, 80 South Jefferson Road, Whippany, New Jersey, 07981
Visit us online at: <http://www.sl.universalservice.org>

Instructions for more information on filing deadlines to ensure that your discounts can be paid retroactively to the Service Start Date. You are advised to keep proof of the date of mailing.

1. If Funding Year 4 services start on or before Sunday, October 28, 2001, and the date of your Funding Commitment Decision Letter is before Sunday, October 28, 2001, your Form 486 must be postmarked on or before October 28, 2001 in order for discounts to be paid retroactively to the Service Start Date. Failure to meet this certification deadline will result in reduced funding.
2. If your services start after October 28, 2001, your Form 486 must be postmarked no later than 120 days after the Service Start Date or 120 days after the date of the Funding Commitment Decision Letter, whichever is later, in order for discounts to be paid retroactively to the Service Start Date. Failure to meet this filing deadline will result in reduced funding.

You may also check the SLD web site at <www.sl.universalservice.org> or call the Client Service Bureau at 1-888-203-8100 for more information about how this new law might impact universal service discounts and any needed documentation for Funding Year 4 (July 1, 2001-June 30, 2002).

TO APPEAL THESE FUNDING COMMITMENT DECISIONS

If you wish to appeal the Funding Commitment Decision(s) (FCD) indicated in this letter, your appeal must be made in writing and RECEIVED BY THE SCHOOLS AND LIBRARIES DIVISION (SLD) at the SLD address below WITHIN 30 DAYS OF THE ABOVE DATE ON THIS LETTER. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify which FCD Letter you are appealing. Indicate the relevant funding year and the date of the Funding Commitment Decision Letter. Your letter of appeal must also include the applicant name, the Form 471 Application Number, and the Billed Entity Number from the top of your FCD Letter.
3. Identify the particular Funding Request Number (FRN) that is the subject of your appeal. When explaining your appeal, include the precise language or text from the Funding Commitment Decision Letter that is at the heart of your appeal. By pointing us to the exact words that give rise to your appeal, the SLD will be able to more readily understand and respond appropriately to your appeal. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an original authorized signature on your letter of appeal.

Please send your appeal to: Letter of Appeal, Schools and Libraries Division, Box 125 - Correspondence Unit, 80 South Jefferson Road, Whippany, NJ 07981. Appeals submitted by fax, phone call, and e-mail CANNOT be processed.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). FCC Office of the Secretary, 445-12th Street SW, Room TW-A325, Washington, DC 20554. You should refer to CC Docket Nos. 96-45 and 97-21 on the first page of your appeal to the FCC. Your appeal must be made in writing and RECEIVED BY THE FCC at the FCC address above WITHIN 30 DAYS OF THE ABOVE DATE ON THIS LETTER. Failure to meet this requirement will result in automatic dismissal of your appeal. Further information regarding filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference area of the SLD web site <www.sl.universalservice.org>.

NOTICE ON RULES AND FUNDS AVAILABILITY

Applicants' receipt of funding commitments is contingent on their compliance with all statutory, regulatory, and procedural requirements of the universal service mechanisms for schools and libraries. FCC Form 471 Applicants who have received funding commitments continue to be subject to audits and other reviews that SLD or the Federal Communications Commission may undertake periodically to assure that funds have been committed and are being used in accordance with all such requirements. If the SLD subsequently determines that its commitment was erroneously issued due to action or inaction, including but not limited to that by SLD, the Applicant, or Service Provider, and that the action or inaction was not in accordance with such requirements, SLD may be required to cancel these funding commitments and seek repayment of any funds disbursed not in accordance

with such requirements. The SLD, and other appropriate authorities (including but not limited to USAC and the FCC), may pursue enforcement actions and other means of recourse to collect erroneously disbursed funds. The timing of payment of invoices may also be affected by the availability of funds based on the amount of funds collected from contributing telecommunications companies.

We look forward to continuing our work with you on connecting our schools and libraries through advanced telecommunications services.

Sincerely,

Schools and Libraries Division
Universal Service Administrative Company

Enclosures

A GUIDE TO THE FUNDING COMMITMENT REPORT

Attached to this letter will be a report for each E-rate funding request from your application. We are providing the following definitions.

FUNDING REQUEST NUMBER (ERN): A Funding Request Number is assigned by the SLD to each Block 5 of your Form 471 once an application has been processed. This number is used to report to Applicants and Service Providers the status of individual discount funding requests submitted on a Form 471.

FUNDING STATUS: Each ERN will have one of three definitions: "Funded," "Not Funded," or "As Yet Unfunded."

1. An ERN that is "Funded" will be approved at the level that SLD determined is appropriate for that item. The funding level will generally be the level requested unless the SLD determines during the application review process that some adjustment is appropriate.
2. An ERN that is "Not Funded" is one for which no funds will be committed. The reason for the decision will be briefly explained in the "Funding Commitment Decision," and amplification of that explanation may be offered in the section, "Funding Commitment Decision Explanation." An ERN may be "Not Funded" because the request does not comply with program rules, or because the total amount of funds in the Universal Service Fund was insufficient to fund all requests.
3. An ERN that is "As Yet Unfunded" reflects a temporary status that is assigned to an ERN when the SLD is uncertain at the time the letter is generated whether there will be sufficient funds to make commitments for requests for internal connections at a particular discount level. For example, if your application included requests for discounts on both telecommunications services and internal connections, you might receive a letter with our funding commitment for your telecommunications funding requests and a message that your internal connections requests are "As Yet Unfunded." You would receive a subsequent letter(s) regarding the funding decision on your internal connections requests.

SERVICES ORDERED: The type of service ordered from the service provider, as shown on Form 471.

SPIN (Service Provider Identification Number): A unique number assigned by the Universal Service Administrative Company to service providers seeking payment from the Universal Service Fund for participating in the universal service support programs. A SPIN is also used to verify delivery of services and to arrange for payment.

SERVICE PROVIDER NAME: The legal name of the service provider.

CONTRACT NUMBER: The number of the contract between the eligible party and the service provider. This will be present only if a contract number was provided on Form 471.

BILLING ACCOUNT NUMBER: The account number that your service provider has established with you for billing purposes. This will be present only if a Billing Account Number was provided on Form 471.

EARLIEST POSSIBLE EFFECTIVE DATE OF DISCOUNT: The first possible date of service for which the SLD will reimburse service providers for the discounts for the service.

CONTRACT EXPIRATION DATE: The date the contract expires. This will be present only if a contract expiration date was provided on Form 471.

SITE IDENTIFIER: The Entity Number listed in Form 471, Block 5, Item 22a will be listed. This will appear only for "site specific" ERNs.

PRE-DISCOUNT AMOUNT: Amount in Form 471, Block 5, Item 23, Column I, as determined through the application review process.

DISCOUNT PERCENTAGE APPROVED BY THE SLD: This is the discount rate that the SLD has approved for this service.

FUNDING COMMITMENT DECISION: This represents the total amount of funding that the SLD has reserved to reimburse service providers for the approved discounts for this service through June 30, 2002. It is important that you and the service provider both recognize that the SLD should be invoiced and the SLD may direct disbursement of discounts only for eligible, approved services actually rendered.

FUNDING COMMITMENT DECISION EXPLANATION: This entry may amplify the comments in the
"Funding Commitment Decision" area.

FUNDING COMMITMENT REPORT

Form 471 Application Number: 256606
 Funding Request Number: 648594 Funding Status: Funded
 Services Ordered: Internet Access
 SPIN: 143005607 Service Provider Name: IBM Corporation
 Contract Number: RFP# 101-00
 Billing Account Number: N/A
 Earliest Possible Effective Date of Discount: 07/01/2001
 Contract Expiration Date: 06/30/2002
 Pre-Discount Amount: \$3,990,900.00
 Discount Percentage Approved by the SLD: 90%
 Funding Commitment Decision: \$3,591,810.00 - FRN approved; modified by SLD
 Funding Commitment Decision Explanation: Category changed to Internet Access. The dollars requested were reduced for products/services received outside the current funding year.

Funding Request Number: 648646 Funding Status: Funded
 Services Ordered: Internal Connections
 SPIN: 143005607 Service Provider Name: IBM Corporation
 Contract Number: RFP# 101-00
 Billing Account Number: N/A
 Earliest Possible Effective Date of Discount: 07/01/2001
 Contract Expiration Date: 06/30/2002
 Pre-Discount Amount: \$3,587,806.28
 Discount Percentage Approved by the SLD: 90%
 Funding Commitment Decision: \$3,229,025.65 - FRN approved; modified by SLD
 Funding Commitment Decision Explanation: The dollars requested were reduced to remove the ineligible products: Data Cartridges, and Cleaning Cartridge.

Funding Request Number: 648729 Funding Status: Funded
 Services Ordered: Internal Connections
 SPIN: 143005607 Service Provider Name: IBM Corporation
 Contract Number: RFP# 101-00
 Billing Account Number: N/A
 Earliest Possible Effective Date of Discount: 07/01/2001
 Contract Expiration Date: 06/30/2002
 Pre-Discount Amount: \$4,336,104.00
 Discount Percentage Approved by the SLD: 90%
 Funding Commitment Decision: \$3,902,493.60 - FRN approved; modified by SLD
 Funding Commitment Decision Explanation: The dollars requested were reduced to remove the ineligible products: IP/TV Control Servers.

Funding Request Number: 648758 Funding Status: Funded
 Services Ordered: Internal Connections
 SPIN: 143005607 Service Provider Name: IBM Corporation
 Contract Number: RFP# 101-00
 Billing Account Number: N/A
 Earliest Possible Effective Date of Discount: 07/01/2001
 Contract Expiration Date: 06/30/2002
 Pre-Discount Amount: \$2,730,031.00
 Discount Percentage Approved by the SLD: 90%
 Funding Commitment Decision: \$2,457,027.90 - FRN approved; modified by SLD
 Funding Commitment Decision Explanation: The dollars requested were reduced to remove the ineligible products: Education Card, and 2/3 of multi-year ServiceSuite Advanced maintenance.

FUNDING COMMITMENT REPORT

Form 471 Application Number: 256606
Funding Request Number: 648793 Funding Status: Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: RFP# 101-00
Billing Account Number: N/A
Earliest Possible Effective Date of Discount: 07/01/2001
Contract Expiration Date: 06/30/2002
Pre-Discount Amount: \$27,121,700.00
Discount Percentage Approved by the SLD: 90%
Funding Commitment Decision: \$24,409,530.00 - FRN approved as submitted

Funding Request Number: 648857 Funding Status: Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: RFP# 101-00
Billing Account Number: N/A
Earliest Possible Effective Date of Discount: 07/01/2001
Contract Expiration Date: 06/30/2002
Pre-Discount Amount: \$11,636,600.00
Discount Percentage Approved by the SLD: 90%
Funding Commitment Decision: \$10,472,940.00 - FRN approved as submitted

Funding Request Number: 648909 Funding Status: Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: RFP# 101-00
Billing Account Number: N/A
Earliest Possible Effective Date of Discount: 07/01/2001
Contract Expiration Date: 06/30/2002
Pre-Discount Amount: \$2,919,700.00
Discount Percentage Approved by the SLD: 90%
Funding Commitment Decision: \$2,627,730.00 - FRN approved as submitted

Funding Request Number: 648960 Funding Status: Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: RFP# 101-00
Billing Account Number: N/A
Earliest Possible Effective Date of Discount: 07/01/2001
Contract Expiration Date: 06/30/2002
Pre-Discount Amount: \$6,500,600.00
Discount Percentage Approved by the SLD: 90%
Funding Commitment Decision: \$5,850,540.00 - FRN approved as submitted

FUNDING COMMITMENT REPORT

Form 471 Application Number: 256606
Funding Request Number: 648996 Funding Status: Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: RFP# 101-00
Billing Account Number: N/A
Earliest Possible Effective Date of Discount: 07/01/2001
Contract Expiration Date: 06/30/2002
Pre-Discount Amount: \$7,867,400.00
Discount Percentage Approved by the SLD: 90%
Funding Commitment Decision: \$7,080,660.00 - FRN approved as submitted

Exhibit F

Final Invoice, Maintenance Services, Funding Request 648793.

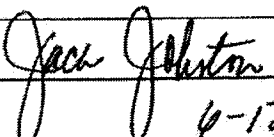
Service Certification

Service Provider Name	IBM Corporation
Service Provider SPIN	143005607
Service Provider Invoice #	2760274-06 (USF MA Services)
Undiscounted Invoice Amount	3,390,212.50
Discounted Invoice Amount	3,051,191.25

Applicant Name	El Paso Independent School District
Representative / Contact Name	Jack Johnston
Representative / Contact Title	Executive Director Technology & Information Systems
Representative / Contact Phone	915-779-4235
Billed Entity Number (BEN)	142118
471#	256606
FRN#	648793
Date Services Delivered and Installed	06/12/02

This is to certify that I am authorized to represent the above named applicant. This is also to certify the services described on the attached vendor invoice were delivered and installed.

Or The charges represented by the above represented invoice are deposits or up-front charges for services, which have not been delivered, and have been agreed to based on the contract between the above referenced Applicant and Service Provider.

Signed: 	Signed:
Date: 6-12-02	Date:
Copy of <u>detailed</u> vendor invoice must be attached	Copy of <u>supporting contract</u> must be attached if indicated below Supporting Contract Required YES NO



IBM PALSERV
86

IBM GLOBAL SERVICES
E-RATE INVOICE FOR SERVICES

Please remit payment to:
IBM Global Services US
Jody Ryan
4700 S. Syracuse Street
Denver, CO 80237
303-773-5464

Invoice Number
CGSJK06

IBM Customer Number
2760274

Invoice Date
06/12/2002

Terms
DUE UPON RECEIPT

Invoice to:
El Paso Independent School District (EPISD)
6531 Boeing Drive
El Paso, TX 79925
915-779-4333

EPISD PO Number
234789

EPISD/SLD FRN Number
848793

IBM Contract Number
CFT55SH

PROJECT Reference
USF MA SERVICES

IBM Work Number
C6SJK

Comments
Please reference the IBM Invoice number
and IBM Customer number on your check.

Vendor Number
21581

Page #
1 OF 1

Services provided May 2002 through June 2002.

Maintenance Operations Center and maintenance support office.

Site and connectivity Networking Services Support.

Network Infrastructure Support

Local Area Network (LAN) Maintenance, including network hardware.

Maintenance procedures supporting networking systems and maintenance, including design,
installation, implementation and customization of network functions.

Technical resources for network maintenance support.

TOTAL

\$3,390,212.50

SLD PORTION DUE

\$3,051,191.25

EPISD PORTION DUE

\$339,021.25

IF NOT PAID BY JULY 12, 2002, EPISD
PLEASE PAY THIS AMOUNT

\$343,259.02

IBM SIGNATURE:

EPISD SIGNATURE:

Exhibit G

Letter from SLD to Bob Richter, National ERate Program Executive, IBM
(Sept. 16, 2004).



Universal Service Administrative Company
Schools & Libraries Division

George McDonald
Vice President, Schools and Libraries Division

September 16, 2004

Bob Richter
National ERate Program Executive
IBM Corporation
166 Deer Run
Burlington, CT 06013

RE: El Paso Independent School District Funding Year 2001 FCC Form 471 # 256606

Dear Mr. Richter:

In Funding Year 2001, El Paso Independent School District (El Paso ISD) submitted FCC Form 471 # 256606 to the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) seeking funding for eight internal connections Funding Request Numbers (FRNs) and one Internet access FRN. IBM Corporation (IBM) is the service provider associated with each of these FRNs. USAC funded these requests and eventually disbursed \$55.3 million to IBM for providing the products and services to El Paso ISD.

USAC approved these funding requests based upon the FCC Form 471 Item 21 attachments submitted to USAC, and upon information provided to Program Integrity Assurance (PIA) reviewers during the review of the funding requests.

USAC has since obtained the Statements of Work that underlie each FRN. USAC's analysis of these Statements of Work raises significant questions about the eligibility of the actual products and services for which funding was disbursed to IBM. This analysis indicates that the Item 21 attachments generally do not accurately reflect the products and services identified in the Statements of Work. Specifically, USAC's analysis concludes that:

- The funding commitment for FRN 648646 should be analyzed to determine which costs are allocable to eligible products and services, and which to ineligible products and services. If no documentation is available, the funding commitment for this FRN should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648729 should undergo cost allocation based on the issues identified in the analysis. The funding commitment will need to be

rescinded in part and recovery sought for any amounts disbursed for ineligible products and services.

- The funding commitment for FRN 648758 should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648793 contains substantial ineligible services and must undergo cost allocation.
- The funding commitment for FRNs 648909, 648960, and 648594 should be analyzed to determine whether the funding commitment was limited to 52 locations at a 90% discount. If the funding commitment was not limited to 52 locations, the funding commitment will need to be rescinded in part and recovery sought for any amounts disbursed for products and services delivered to locations that do not qualify for a 90% discount. For FRN 648594, a final eligibility determination needs to be made for fiber exclusive access service.
- The funding commitments for FRNs 648857 and 648996 do not appear to raise eligibility issues.

The detailed analysis is enclosed for your review. Also enclosed are the Statements of Work on which the analysis is based.

USAC requests that you respond to USAC's eligibility determinations explained in the enclosed analysis. In some instances, it is not clear based on the information available at this time the extent to which the FRNs contain ineligible products and services. If you believe that all of the products and services for which funding was committed were eligible for funding, provide any and all documentation necessary to support your position. Furthermore, if you believe that all of the products and services for which USAC disbursed funds were eligible for funding, provide any and all documentation necessary to support your position.

USAC is required to adjust funding commitments and seek recovery as necessary when it determines that it made a funding commitment in error. If you do not respond to this request within 30 days of the date of the letter, USAC will base its commitment adjustment determinations on the documentation enclosed for your review.

We expect to work with you in making a final determination of the eligible and ineligible components of funding requests in this application, and I hope your response will advance that process.

Sincerely,



George McDonald
Vice President, Schools and Libraries Division

cc: Jack Johnston, Executive Director, TIS, El Paso Independent School District

Enclosures

Universal Service Administrative Company, Schools and Libraries Support Mechanism Eligibility Analysis

Statement of Work for El Paso Independent School District for Fiber Network Exclusive Internet Access
1/18/2001.

IBM Proposal to El Paso Independent School District for Cabling Services 1/18/2001.

IBM Statement of Work for El Paso Independent School District for Email 1/18/2001.

IBM Statement of Work for El Paso Independent School District for Network Electronics 1/18/2001.

IBM Statement of Work for El Paso Independent School District for Server Upgrade 1/18/2001.

IBM Statement of Work for El Paso Independent School District for IBM's Web Access for a School
Community Solution, 1/18/2001.

Contract for the Provision of USF Maintenance Services for El Paso Independent School District
1/18/2001.

IBM Statement of Work for Video Solution and Installation Services for El Paso Independent School
District, 1/18/2001.

IBM Statement of Work for El Paso Independent School District for Web and File Server Project 1/18/2001

Universal Service Administrative Company
Schools and Libraries Support Mechanism

ELIGIBILITY ANALYSIS
EL PASO INDEPENDENT SCHOOL DISTRICT
FUNDING YEAR 2001
FCC FORM 471 # 256606

OVERVIEW

This paper contains an analysis of the eligibility of products and services requested by El Paso Independent School District (EPISD) on FCC Form 471 # 256606, and funded by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC), for Funding Year 2001.

Of the nine FCC Forms 471 submitted by EPISD for Funding Year 2001, FCC Form 471 # 256606 stands out as having service eligibility issues. This Form 471 includes eight Internal Connections funding requests and one Internet Access funding request for a wide range of technology deployment, such as network electronics, video technology, file servers, and cabling.

During Program Integrity Assurance (PIA) Review, SLD determined that some Funding Request Number(s) (FRNs) contained ineligible components, and the costs of those components were removed from the FRNs prior to approval. ~~Apart from this standard process, no significant eligibility issues were apparent under then current review procedures.~~

Subsequently, SLD obtained the Statements of Work for each FRN on this Form 471 application. SLD has evaluated these Statements of Work and other relevant information, and has determined, based on this documentation, that some FRNs are in fact NOT eligible for funding, and that there are questions about the extent to which other FRNs are eligible for funding.

FCC FORM 471 # 25606

Below is a table indicating the amount committed and disbursed for each FRN on this FCC Form 471 application. The final column below states the results of SLD's review based on the Statements of Work for each FRN.

<u>FRN</u>	<u>FUNCTIONALITY</u>	<u>COMMITTED \$</u>	<u>DISBURSED \$</u>	<u>ANALYSIS CONCLUSION</u>
648646*	E-mail	\$3,229,025.65	\$3,229,025.25	Ineligible components must be cost allocated
648729*	Video	\$3,902,493.60	\$3,324,008.12	Requires cost allocation;

Universal Service Administrative Company
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				questions raised
648758	Web Access	\$2,457,027.90	\$2,457,027.87	NOT ELIGIBLE
648793	Maintenance	\$24,409,530.00	\$24,409,530.00	Substantial ineligible services must be cost allocated.
648857*	Network Electronics	\$10,472,940.00	\$9,042,502.06	No issues apparent
648909*	Server Upgrades	\$2,627,730.00	\$1,506,832.13	Quantity changes appear acceptable. Need to verify location of servers.
648960*	Web & File Servers	\$5,850,540.00	\$3,374,300.63	Quantity changes appear acceptable. Need to verify location of servers. Needs cost allocation to subtract ineligible functionality.
648996	Network Cabling	\$7,080,660.00	\$7,080,660.00	No issues apparent
648594	Internet Access	\$3,591,810.00	\$878,310.00	Need to make final eligibility determination for fiber exclusive access service, and need to

Universal Service Administrative Company
Schools and Libraries Support Mechanism

				determine if service was limited to 52 locations.
--	--	--	--	--

* Those FRN's marked with an asterisk had service substitution requests submitted after approval of the funding request. None of the service substitution requests appears to change the analysis in this report.

Thus, for the nine funding requests, this analysis concludes that one is clearly not eligible for funding, six raise further questions, and two appear to raise no eligibility questions that cannot be answered from a review of existing information.

This analysis does not necessarily identify every questionable or ineligible product or service in the Statement of Work, but relies on significant examples of core eligibility issues.

E-mail Funding Request (FRN 648646)

The Item 21 Attachment submitted in support of the FRN contained some components (data cartridges and cleaning cartridges) that are not eligible for funding. Costs for these components were removed from the FRN by PIA Review personnel. No other indications of ineligible products or services were apparent based only on review of the Item 21 Attachment.

Subsequently, a copy of the service provider's Statement of Work was obtained. Page 4 of the Statement of Work indicates that "all non e-rate eligible products and services are excluded from this agreement and is (sic) included in a separate contract." This phrase indicates that all aspects of the Statement of Work were felt to be E-rate eligible. However, significant aspects of the Statement of Work are clearly not eligible under SLD program rules.

Examples from the Statement of Work that indicate ineligible services include:

- "[P]erform planning and assessment for email deployment," i.e., ineligible consulting services
- "Develop distributed email architecture," i.e., ineligible consulting services
- "Specify email server sizing & configuration," i.e., ineligible consulting services, since server size and configuration have already been specified in the Form 471
- "Develop minimum client specifications for desktop hardware, software, and Operating systems," i.e., ineligible consulting, since such end user components are not eligible for E-rate funds
- "Assist in development of district-wide email Policies & Procedures, i.e., ineligible consulting

Universal Service Administrative Company Schools and Libraries Support Mechanism

- “Develop end-user training curriculum and materials, and train trainers,” i.e., ineligible training
- “Develop graphic & layout design standards,” i.e., ineligible content development
- Provide “free firewall software,” i.e., ineligible security functions that require a cost reduction to be compliant with the SLD Free Services Advisory
- “[P]rovide CyberPatrol content filtering on two servers to allow content filtering of Internet access,” i.e., ineligible filtering software
- “Establish and facilitate a District Web Policy Steering Committee,” i.e., ineligible consulting since this function is not directly tied to the actual installation and initial operation of eligible components
- “Assist in developing District-wide Policies and Procedures,” i.e., ineligible consulting
- “Develop a comprehensive Web implementation strategy, including input from stakeholders throughout the district,” i.e., ineligible consulting.
- “Develop a strategy for distributed Web maintenance, including template-based design and designated Content Managers,” i.e., ineligible support for ineligible content
- “Provide a toolkit of reusable Web component templates,” i.e., ineligible content software
- Provide Content Manager Training,” i.e., ineligible training
- “Conduct research & planning for future Intranet integration with internal systems,” i.e., ineligible consulting
- “We will provide and install three Domino applications as pilots...” i.e., ineligible software

A determination of the costs of these ineligible components is required.

Video Funding Request (FRN 648729)

The Statement of Work provides substantially more detail than what is provided by the applicant's Item 21 Attachment. It specifies products that are not eligible, or that require cost allocation, as follows:

- (17) Cisco Archive Server
- (16) Cisco Content Engine

The Archive Server provides ineligible caching. The Content Engine also includes ineligible caching, and additionally includes some eligible functionality. The full cost of the Archive Servers must be eliminated from the funding request, and a percentage of the cost of the Content Engines must be eliminated from the funding request. The Statement of Work specifically indicates that there has been no subtraction for the ineligible functionality.

Perhaps more fundamentally, the Statement of Work consistently indicates that the video solution is to be implemented for 90 locations, whereas only 52 locations are specified in

Universal Service Administrative Company Schools and Libraries Support Mechanism

Block 5 of Form 471. The applicant's Block 4 information includes a listing of 52 schools with a shared discount of 90%, and also includes a listing of 91 locations with a shared discount of 78%. This raises the question of whether the funding request is for the 52 sites with a shared discount of 90% only, or whether it also included the additional 39 locations with a shared discount of 78%.

The Statement of Work indicates that "IBM will...operate...the video solution for EPISD for a period of one year." Operation of video components is not eligible for funding. The Statement of Work indicates that a "dedicated support staff (3) will be assigned to EPISD to ensure proper coverage." This is taken to mean that three contractor persons will be devoted to operation of the equipment, as well as administration and support. Dedicated contractor personnel have been funded by SLD when the maintenance requirements of a large applicant can justify this arrangement in comparison to on-call personnel. However, this arrangement cannot be interpreted as providing for operational services that would otherwise be provided by the applicant's own staff.

The Statement of Work indicates that the video solution requirements will be re-verified, and that the development of the current list of requirements will affect the final design of the solution. Technical services such as program management and engineering design can be eligible for funding if directly tied to installation and operation, but are not eligible if involved with initial planning activities. Further investigation of the scope and details of this aspect of the project would be required to determine the extent of ineligible services.

Web Access Funding Request (FRN 648758)

The Statement of Work reveals that the funding request is for a product called "IBM Web Access for a School Community." This product has been determined to be a collaboration package that provides application software, and is ineligible for funding.

Maintenance Funding Request (FRN 648793)

The Item 21 Attachment for maintenance services described two principal activities, hardware maintenance and technical support. A review of the Statement of Work indicates that an extensive on-site "Maintenance Support Office" was to be provided. This was a comprehensive Help Desk facility that provided a level of services well beyond the scope of other support services seen by SLD staff. The services described in the Statement of Work appear to have been integrally tied to the provision of ineligible components.

A computer "Help Desk" accepts support calls from end users, and initiates action to resolve the problem. This action might involve initial diagnostics, creation of a Trouble Ticket, logging the support call, and alerting other personnel that a problem exists. Such

Universal Service Administrative Company Schools and Libraries Support Mechanism

a Help Desk function is not eligible under SLD program rules, because it is not limited only to support of the products and services that are eligible for E-rate funds.

The Statement of Work indicates that the Help Desk would “[a]ccept support related calls from end users.” Calls from end-users would include problems with end-user workstation operating systems and hardware, and potentially other areas such as questions about the operation and configuration of end-user software. Such end user support is clearly not eligible for E-rate funding. Even if the actual correction of a problem involves non-contractor personnel, and is therefore not reimbursed with E-rate funds, the routing and logging function of the comprehensive Help Desk activities would include ineligible support services.

Furthermore, a comprehensive Help Desk system goes beyond the level of support authorized by the FCC in the original Universal Service Order: “[S]upport should be available to fund discounts on such items as routers, hubs, network file services, and wireless LANs and their installation and basic maintenance....” See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, FCC 97-157 ¶ 460 (rel. May 8, 1997). (Emphasis added.) There is no authorizing language that provides for the level of support provided by the Help Desk facility described in the Statement of Work.

On the contrary, paragraph 459 of the original Universal Service Order indicates that support will be provided for a product or service “only if it is necessary to transport information all the way to individual classrooms. That is, if the service is an essential element in the transmission of information within the school or library....” (Emphasis added.)

The lack of eligibility for many or all of the Help Desk services is not a determination that such facilities have no value, but simply that they fail to meet eligibility requirements. Industry information indicates that approximately 20% of a technology implementation can be funded through E-rate eligibility, with the remaining 80% not eligible. (See, for example, paragraph 497 in the “97 Report and Order.)

Network Electronics Funding Request (FRN 648857)

No product and service eligibility issues were apparent in the review of the Network Electronics Statement of Work.

Server Upgrade Funding Request (FRN 648909)

The Statement of Work specifies that up to 90 file servers will be installed. Only 52 locations are specified in the Form 471 as having a 90% shared discounts. Briefing information from the service provider indicates that the applicant erred in the quantity specification, and that the correct number is 52 file servers. Further investigation is

Universal Service Administrative Company
Schools and Libraries Support Mechanism

needed to determine whether the original funding commitment was for file servers at 90 locations, or for file servers at the 52 locations that had a 90% discount.

Web & File Server Funding Request (FRN 648960)

The Statement of Work specifies that up to 90 file servers and up to 90 web servers will be installed. Technical specifications of these servers are identical to the technical specifications of the servers in the previous section of this analysis. Briefing information from the service provider indicates that the applicant erred in the quantity specification, and that the correct number is 52 file servers and 52 web servers. Further investigation is needed to determine whether the original funding commitment was for file servers at 90 locations, or for file servers at the 52 locations that had a 90% discount.

The Statement of Work indicates that proxy, DHCP, and server caching will be provided. Proxy services and caching are not eligible uses. Therefore, the proportion of server functionality providing these ineligible features should be determined and the appropriate ineligible cost calculated.

Network Cabling Funding Request (FRN 648996)

No product and service eligibility issues were apparent in the review of the Network Cabling Statement of Work.

Internet Access Funding Request (FRN #648594)

The Internet Access Statement of Work indicates that high bandwidth access will be provided for up to 90 campuses. Since only 52 locations are a part of the specification for this funding request, this raises the question of whether the funding request is for the 52 sites with a shared discount of 90% only, or whether it also included the additional 39 locations with a shared discount of 78%.

Furthermore, the Statement of Work indicates that "fiber high speed optic cable or other digital media" will be "used for exclusive access to the Internet." The FCC has raised high concern over exclusive access arrangements, and indicates that funding is not to be provided for arrangements that, even if titled a lease of services, reach essentially the same result as a prohibited WAN purchase. Further information is required to make a final determination, including whether a lease-purchase option exists and whether E-rate funds were requested for up-front costs of service provider infrastructure.

CONCLUSION

The analysis above indicates the following:

Universal Service Administrative Company
Schools and Libraries Support Mechanism

- The funding commitment for FRN 648646 should be analyzed to determine which costs are allocable to eligible products and services, and which to ineligible products and services. If no documentation is available, the funding commitment for this FRN should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648729 should undergo cost allocation based on the issues identified in the analysis. The funding commitment will need to be rescinded in part and recovery sought for any amounts disbursed for ineligible products and services.
- The funding commitment for FRN 648758 should be rescinded in full and recovery sought for any amounts disbursed.
- The funding commitment for FRN 648793 contains substantial ineligible services and must undergo cost allocation.
- The funding commitment for FRNs 648909, 648960, and 648594 should be analyzed to determine whether the funding commitment was limited to 52 locations at a 90% discount. If the funding commitment was not limited to 52 locations, the funding commitment will need to be rescinded in part and recovery sought for any amounts disbursed for products and services delivered to locations that do not qualify for a 90% discount. For FRN 648594, a final eligibility determination needs to be made for fiber exclusive access service.
- The funding commitments for FRNs 648857 and 648996 do not appear to raise eligibility issues.

Exhibit H

Letter from SLD to Christine Hill, IBM, “Further Explanation Letter”
(Sept. 25, 2007).

September 25, 2007

International Business Machines Corporation
Ms. Christine Hill
3039 Cornwallis Road
Building 203
Research Triangle Park, NC 27709

RE: Further Explanation of Commitment Adjustment Letters and Recovery of
Improperly Disbursed Funds Letter to El Paso Independent School District and
IBM Corporation
Funding Year 2001 FCC Form 471 # 256606

Dear Ms. Hill:

Under separate cover, you are being sent Commitment Adjustment and Recovery of Improperly Disbursed Funds Letters (Notification Letters) concerning the FCC Form 471 Application Number cited above. **Please be advised that the Notification Letters are the official action on this application by the Universal Service Administrative Company (USAC). Please refer to those letters for instructions regarding how to appeal the Administrator's decision, if you wish to do so.** The purpose of this letter is to provide you with additional information concerning the reasons for USAC's Commitment Adjustments and Recovery of Improperly Disbursed Funds decisions.

Factual Background

In Funding Year 2001, El Paso Independent School District (El Paso ISD) submitted FCC Form 471 # 256606 to the Schools and Libraries Division (SLD) of USAC seeking funding for eight internal connections Funding Request Numbers (FRNs) and one Internet access FRN. IBM Corporation (IBM) is the service provider associated with each of these FRNs. USAC funded these requests and eventually disbursed \$55.3 million to IBM related to these FRNs.

USAC later learned that the FRNs may not have been in compliance with Federal Communications Commission (FCC or Commission) rules governing the Schools and Libraries program. On September 16, 2004, USAC notified IBM of its initial eligibility determinations for each FRN based on documentation that had been provided to USAC after USAC made its original funding decision, and requested that IBM respond to

USAC's eligibility determinations.¹ USAC later contacted El Paso ISD for information related to certain FRNs for which El Paso ISD could provide relevant information. Since that time, IBM and El Paso ISD have responded to USAC's preliminary eligibility determinations and questions. On June 19, 2006, USAC provided El Paso ISD and IBM with its eligibility determinations and provided a final opportunity for El Paso and IBM to submit additional information to enable USAC to make its final recovery determinations.² IBM and El Paso ISD each responded to USAC's June 2006 Letter. USAC has carefully considered the responses from IBM and El Paso ISD as explained in detail below, and has determined that ineligible products and services were provided for certain FRNs, that funds were improperly disbursed for one FRN, and that recovery should be sought from IBM and El Paso ISD as explained below.

Regulatory Background

In preparing request(s) for funding, applicants seeking discounted services through the Schools and Libraries program must follow certain competitive bidding requirements. An applicant initiates the competitive bidding process when an applicant submits an FCC Form 470 to USAC for posting on the USAC website.³ This posting enables prospective service providers to bid on the equipment and services for which the applicant will request universal service support. After the FCC Form 470 has been posted, the applicant must wait at least 28 days before entering into agreements with service providers, must comply with all applicable state and local procurement laws, and must comply with the other competitive bidding requirements established by the FCC.⁴ Upon selecting the service provider(s), applicants submit FCC Form 471 on an annual basis specifying, among other things, the services to be provided and the cost.⁵

Schools and Libraries program rules authorize USAC to provide universal service support to telecommunications carriers and non-telecommunications carriers for providing supported services to eligible entities.⁶ Each funding year, the Commission approves an Eligible Services List (ESL), which provides details about eligible equipment and services, and the conditions under which they are eligible.⁷ USAC makes funding decisions consistent with the guidance in the ESL for each funding year. With

¹ See Letter from George McDonald, Vice President, Schools and Libraries Division, USAC, to Bob Richter, National ERate Program Executive, IBM Corporation, September 16, 2004 (*September 2004 Letter*).

² See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, USAC to Bob Richter and Tony Wening, National ERate Program Executive, IBM Corporation, Terri Jordan, Executive Director, Business Services, Technology and Information Systems, El Paso Independent School District, June 19, 2006 (*June 2006 Letter*).

³ See 47 C.F.R. § 54.504(b); Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806 (FCC Form 470).

⁴ See 47 C.F.R. §§ 54.504, 54.511; In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Red 8776, ¶ 575 (rel. May 8, 1997) (*Universal Service Order*).

⁵ See 47 C.F.R. §§ 54.504(c), 54.507(d) (2000); Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Item 25 (October 2000)(FCC Form 471).

⁶ See 47 C.F.R. §§ 54.501(a), 54.502, 54.503, 54.517, 54.518, 54.519, 54.522.

⁷ See 47 C.F.R. 54.522.

the exception of ancillary ineligible components, where products and services contain eligible and ineligible components, "costs must be allocated to the extent that a clear delineation can be made between the eligible and ineligible components. The delineation must have a tangible basis, and the price for the eligible portion must be the most cost-effective means of receiving the eligible service."⁸ The cost allocation must be based on tangible criteria that provides a realistic result.⁹ When USAC is not provided with the information necessary to separate the eligible and ineligible portions, USAC generally rescinds the entire commitment for that FRN and seeks recovery of the full amount disbursed.¹⁰

The Commission requires USAC to rescind funding commitments and seek recovery of funds disbursed when USAC determines that it committed funds in error because the commitment constitutes a violation of the Communications Act of 1934, as amended;¹¹ or a violation of Commission rules.¹² USAC also seeks recovery of Improperly Disbursed funds when funds were disbursed in violation of the statute or Commission rules, but the original commitment was consistent with the statute or Commission rules. When USAC determines that both eligible and ineligible products and services have been provided, USAC adjusts the funding commitment and seeks recovery of the ineligible portion only. Applicants and service providers, who disagree with any of USAC's commitment adjustment and/or recovery decisions, can appeal those decisions to USAC and/or the Commission.¹³

Overview of USAC's Determinations

USAC has reviewed the documentation provided by IBM and/or El Paso ISD and has determined that no commitment adjustments or recoveries will be sought at this time for FRNs 648909, 648594, 648857, or 648996 based on the information provided. For

⁸ 47 C.F.R. § 54.504(g). This rule codified existing guidelines for allocating costs between eligible and ineligible services. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, ¶ 31 (2003) (*Schools and Libraries Third Order*).

⁹ <http://www.universalservice.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx>.

¹⁰ See *Schools and Libraries Third Order*, 18 FCC Rcd 26912, ¶ 32 (2003).

¹¹ 47 U.S.C. § 254.

¹² See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, FCC 99-291 (1999) (*Commitment Adjustment Order*); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 15 FCC Rcd 7197 (1999) (*Commitment Adjustment Waiver Order*); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 15 FCC Rcd 22975 (2000) (*Commitment Adjustment Implementation Order*); *Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21, 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252 (2004) (*Schools and Libraries Fourth Order*); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808 (2004) (*Schools and Libraries Fifth Order*).

¹³ See 47 C.F.R. §§ 54.719-54.725.

the remaining FRNs, USAC seeks recovery of a total of \$19,448,146.54 from IBM and/or El Paso ISD. For FRN 648758, USAC will seek recovery of \$1,279,631.59 from IBM disbursed for ineligible items base on information provided by IBM. For FRNS 648646, 648729, 648793, and 648960, in the paragraphs below, USAC explains the basis for its eligibility and recovery determinations. USAC has carefully considered IBM and El Paso ISD's responses, and has determined that commitments need to be adjusted and recovery sought as set forth in the table below.

FRN	DESCRIPTION	COMMITMENT	DISBURSEMENT	RECOVERY AMOUNT	PARTY
648729	Vidco	\$3,902,493.60	\$3,324,008.12	\$742,075.13	IBM
648758	Web access	\$2,457,027.90	\$2,457,027.87	\$1,279,631.59	IBM
648960	File Servers	\$5,850,540.00	\$3,374,300.00	\$843,575.00	IBM and El Paso ISD
648646	E-mail	\$3,229,025.65	\$3,229,025.65	\$180,792.47	IBM
648793	Maintenance	\$24,409,530.00	\$24,409,530.00	\$16,402,072.35	IBM
	Total			\$19,448,146.54	

E-MAIL FUNDING REQUEST - FRN 648646

USAC committed \$3,229,025.65 for this FRN and disbursed the full amount to IBM. USAC identified 17 descriptions, out of approximately 44, in the relevant Statement of Work that appeared to indicate ineligible components. IBM responded that products and services for Design and Engineering, Training, and Provide Documentation are eligible for funding.¹⁴ Additionally, IBM provided a list of services for which it was unsure whether the items were eligible for funding.

IBM also submitted an unexecuted Change Authorization to support its position that ineligible services which were initially included in the Statement of Work were never performed.¹⁵ IBM stated that this Change Authorization eliminated the ineligible items, and that "SLD was not invoiced for these tasks."¹⁶ However, USAC reviewed invoicing documentation submitted by IBM and/or El Paso ISD to USAC for this FRN and has determined that USAC was invoiced and disbursed funds for ineligible items that were included on the Statement of Work, but purportedly eliminated by the Change Authorization. That is, services which were eliminated by the Change Authorization were in fact delivered and funds were disbursed. USAC provided copies of the records supporting this conclusion to IBM and El Paso ISD. Because the Change Authorization

¹⁴ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to George McDonald, Vice President, Schools and Libraries Division, USAC, March 25, 2005.

¹⁵ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Phil Gieseler, Eligible Services Manager, Schools and Libraries Division, USAC, August 17, 2005.

¹⁶ *Id.*

was unexecuted, and because the documentation in USAC's files conflicted with the Change Authorization, USAC initially rejected the Change Authorization as a basis for determining which products and services were provided for this FRN.

The Statement of Work for the E-mail FRN provided a description of 47 separate tasks. USAC assigned a number to each of these, and will refer to that number in the discussion below. As stated above, USAC's analysis determined that 17 of these descriptions raised eligibility questions. After considering the information submitted, USAC classifies these services as follows:

1. With respect to Items 1-3, IBM argues that certain activities are not ineligible planning, but rather are eligible design and engineering costs. USAC rejects the majority of these arguments and has conducted a cost allocation based on the information available.
2. With respect to Items 4-6, IBM has provided information that USAC accepts as a resolution.
3. With respect to Items 6-17, IBM has now submitted signed Change Authorizations indicating that the questionable services were not performed, but instead other activities were conducted. Except as discussed below, USAC does not question the eligibility of the added activities and accepts the signed Change Authorizations as a resolution.
4. With respect to Item 12, this task includes ineligible firewall software, as well as components that appear to be eligible. IBM did not provide a cost allocation for this ineligible software, but USAC has conducted a cost allocation based on the information available.
5. With respect to Item 17, in response to USAC's request that IBM provide cost allocation information, IBM reserving its right to appeal the underlying eligibility question submitted a cost allocation for this task.¹⁷

Eligibility Determinations and Cost Allocation Analysis

IBM identifies the hardware and software costs as totaling \$492,270.20 and the labor costs as totaling \$3,095,536.08 for this FRN. This cost allocation is based on the labor costs distributed across 47 individual tasks. IBM has weighted each of the 47 tasks equally: "[s]ince the level of detail on individual tasks is limited, we have opted to use a 'per description (task)' cost allocation of the type frequently used by USAC in PIA initial

¹⁷ IBM indicates that the task originally indicated in the Statement of Work was eliminated, but also indicates that a similar task was added and performed. To aid discussion and due to these similarities, this analysis does not distinguish between the subtracted and added tasks in this instance.

reviews.”¹⁸ Dividing the labor cost by 47 individual tasks provides a cost per task of \$65,862.47 attributable to each task, which at a 90% applicant discount is equivalent to \$59,276.22 post-discount.

USAC accepts the cost allocation methodology employed by IBM in this case. USAC’s June 19, 2006 letter stated “[u]nder the circumstances present here, if we receive information that each of the approximately 44 components to the funding request involved about the same level of effort, then the funding request could be cost allocated so that recovery would be sought for 15/44 of the funds disbursed.” IBM has not provided information establishing that each component involved about the same level of effort. However, USAC understands IBM’s use of this methodology to be an implicit statement to this effect. USAC’s acceptance of IBM’s approach is limited to the circumstances in this FRN. USAC sees no information in the record that would contradict the assumptions underlying a cost allocation approach based on equal weighting of the tasks indicated in the Statement of Work.

Items 1-3

Items 1-3 of the Statement of Work are: “Develop distributed email architecture”; “Specify email server sizing & configuration”; and “perform planning and assessment for email deployment.” IBM posits that these are eligible “design and engineering” services. The ESL applicable to this time period has no entry for “design and engineering.”¹⁹ Instead, the relevant entries indicate that on-site technical support is conditionally eligible, but that consulting services are not eligible.²⁰ Eligible technical support generally involves the services directly necessary for a technology to be put into place. The services are closely tied to actual installation and configuration. Ineligible consulting services are associated with the pre-planning activities that involve fundamental decisions about the technology to be employed, such as the network architecture to be used and the specific products to be deployed. Clearly “architecture” of a technology deployment as well as “sizing & configuration” of the equipment must be defined prior to the applicant’s submission of their FCC Form 471. An applicant would not be able to make a responsible selection in response to the bids submitted, or provide reliable information required on the FCC Form 471, without such detail. Even if planning activities take place after submission of the FCC Form 471, those activities that involve a determination of the technology to be deployed rather than installation and configuration of technology are ineligible consulting services. Planning services that are

¹⁸ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, re: E-mail FRN at 4, August 16, 2006.

¹⁹ Later Eligible Services Lists included this term, and indicated that such services could be eligible if they were provided at the same time as installation. Such services are distinguishable from consulting services as described in the body of this document.

²⁰ See Schools and Libraries, Eligible Services List at 22, 31 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

a part of the normal Schools and Libraries program competitive bidding process are not eligible for funding, as are similar activities that occur within the relevant funding year.

Therefore, USAC has determined activities in the Statement of Work that involve installation and configuration services are eligible for funding, but activities in the Statement of Work that involve a determination of the technology to be deployed are not eligible. Determining the technology to be employed is appropriately characterized as consulting activities, which are ineligible under the applicable ESL.²¹

With this background, each of the three task descriptions at issue are evaluated as follows:

- “Specify email server sizing and configuration” was provided as part of IBM’s Statement of Work to the applicant. The Item 21 Attachment to the FCC Form 471 indicated the specific equipment to be provided. Consequently, the work of specifying the e-mail server sizing and configuration was done prior to the submission of El Paso ISD’s FCC Form 471 for Funding Year 2001 and prior to the start of Funding Year 2001 and therefore is not eligible for funding.
- Similarly, “Develop distributed email architecture” is a necessary component of the procurement activity. Applicants are required to evaluate competing bids,²² and in exercising this responsibility must understand the services to be provided from bidders. Because the activity involves “development” of architecture, rather than implementation, it also falls within an ineligible planning activity that occurred prior to the submission of El Paso ISD’s FCC Form 471 for Funding Year 2001 and prior to the start of Funding Year 2001 and therefore is not eligible for funding.
- Finally, evaluating the task to “perform planning and assessment for email deployment,” the terminology employed—“planning” and “assessment”—raises eligibility questions similar to those indicated above. However, IBM indicates that these activities included migration of old e-mail accounts to the new system, which would be an eligible activity. USAC concludes that the “planning and assessment for email deployment” includes eligible items.

Considering all three of the above activities, and conceding that the last activity could contain some eligible services, USAC concludes that a total of two line items above are not eligible because they provide ineligible consulting services rather than eligible configuration and installation services.

²¹ See Schools and Libraries, Eligible Services List at 31, 37 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

²² See 47 C.F.R. §§ 54.504(a), 54.511(a) (2000).

This conclusion has been reached based on the information available. IBM and El Paso ISD have asserted that the activities were eligible, but these assertions are at odds with the guidelines set forth in the Funding Year 2001 Eligible Services List.²³ Furthermore, IBM ~~did not substantiate its position by providing records of the actual services performed even though there has been ample opportunity for such records to be provided.~~ Therefore, USAC has determined that \$118,552.44 (\$59,276.22 * 2 = \$118,552.44) must be recovered for the line items that include ineligible consulting services.

Item 12

Item 12 of the Statement of Work is: "Install & configure IBM I servers. (2) with free firewall software." Firewall software was not eligible for funding in Funding Year 2001, yet IBM failed to provide a response to USAC's conclusion that the provision, installation, and configuration of firewall software as indicated in the Statement of Work was not eligible.²⁴ Since IBM did not provide a cost allocation, USAC is calculating a cost allocation based on the information available.

The detailed specification of the products to be provided indicates that the line item involves four file servers. Consequently, two of the file servers indicated in this line item received the ineligible products. USAC recognizes that the cost attributable to the ineligible firewall products and related installation and configuration services may be only a part of the overall installation and configuration of the servers. In the absence of cost allocation information submitted by IBM, USAC estimates these costs as 10% of the full installation and configuration tasks for the 50 percent of these servers that received the ineligible software. Thus, USAC's determination of the proportion of cost attributable to the ineligible software (including its installation and configuration) is \$3,293.12. ($\$59,276.22 * 10\% * 50\% = \$2,963.81$).

Item 17

Item 17 of the Statement of Work is "We will provide and install three Domino applications as pilots..." USAC has been informed that IBM bid Lotus Notes for the e-mail project but according to the information submitted, EPISD decided it did not meet their needs. Subsequently, the Domino servers were used with three e-mail programs to evaluate which e-mail solution was best for EPISD. IBM argues that "[t]he IBM service delivery team believed this to be an eligible activity because IBM was assisting EPISD in what amounted to a service substitution."²⁵ USAC rejects this eligibility argument and finds that the activities described clearly fall within ineligible consulting that has never

²³ See Schools and Libraries, Eligible Services List at 31, 37 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

²⁴ IBM states that Change Authorization #9 eliminated this task. However, while the Change Authorization removed sections 2.5 and 2.6 from the Statement of Work, the free firewall software was indicated in section 2.3.

²⁵ *Id.*

been eligible for funding.²⁶ The \$65,862.47 pre-discount figure submitted by IBM will be accepted as the appropriate amount for cost allocation of this activity and each of the 47 individual tasks in the Statement of Work. At the 90% discount level, this figure is equivalent to \$59,276.22.

Total Recovery Amount for FRN 648646: Totalling the cost of all ineligible items, the amount committed for ineligible items for this FRN is \$181,121.78 (\$59,276.22 + \$118,552.44 + \$2,963.81 = \$180,792.47). USAC has adjusted the funding commitment for this FRN and will seek recovery of this amount from IBM via the Commitment Adjustment (COMAD) Letter process.

Video Funding Request -- FRN 648729

USAC committed \$3,902,493.60 for this FRN and disbursed \$3,324,008.12 to IBM. USAC raised two questions related to this FRN: (1) Why the associated costs such as equipment component and labor costs did not decrease when the number of sites originally funded 90 – was decreased to 53, and (2) Whether ineligible products and services were provided.²⁷ With respect to the number of sites funded, IBM responded that the cost of the equipment was decreased by \$641,762, but that the associated costs for installation and configuration services did not decrease.²⁸ With respect to whether ineligible services were provided, USAC has reviewed IBM's responses and has determined that it appears no ineligible services were actually provided.

However, with respect to the amount disbursed for both products and services provided to the reduced number of sites, USAC finds that there should have been a corresponding decrease in associated costs when the number of sites decreased from 90 to 53, even though IBM has indicated that there was no decrease for the services performed. In response to USAC's request that IBM provide cost allocation information,

²⁶ IBM's August 16, 2006 letter describes the work conducted as follows:

As work was commencing, EPISD changed its mind about Lotus Notes and decided it did not meet its needs. EPISD also did not have a specific replacement email package in mind. EPISD asked IBM to assist with selection of a substitute email package, which the service delivery team did, believing such activity to be eligible under E-Rate.

The work done to assist EPISD with this email substitution was to load Domino, as the operating system, and then load the substitution candidates on the server for EPISD to test and evaluate....

In addition, IBM authored a document comparing the three email substitution candidates' pros and cons and provided it as a deliverable and assisted on an as needed basis with the evaluation. Parts of this activity stretched across several weeks....

This description clearly indicates a substantial consulting activity involved with assisting the applicant with a determination of the technology to be deployed. Such a consulting activity is not eligible for E-rate funds.

²⁷ See September 16, 2004 Letter at 2; Eligibility Analysis (attachment to letter) at 4-5.

²⁸ See Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Phil Gieseler, Eligible Service Manager, Schools and Libraries Division, USAC, August 17, 2005.

IBM – reserving its right to appeal the underlying substantive question – submitted a cost allocation indicating an excess disbursement of \$68,359.00.²⁹

Cost Allocation Analysis

USAC concludes that a greater reduction than proposed by IBM is appropriate based on the circumstances of this case. IBM indicates that a reduction in sites does not necessarily call for the same proportionate reduction in the costs of services provided—i.e., some services are required regardless of the number of sites. USAC can accept this general proposition, but, as shown in the table below, finds the specific implementation of this concept by IBM in some cases is not a realistic portrayal of costs that would be unaffected by a decrease in scope.

IBM provided a list of 14 installation and configuration tasks, and assigned percentage figures that represent the level of effort involved for each. IBM indicates that five of the tasks were “infrastructure-related,” and “essentially did not vary based on the number of video sites.” IBM indicates that these five tasks account for 50% of the level of effort. These five tasks, and USAC’s analysis of IBM’s position, are as follows:

Tasks that IBM indicates would not change in scope with a decrease in the number of sites	
FRN Task	USAC Response
1. “All units shipped at the same time from SUBCONTRACTOR will also be tested as a system, if proper documentation has been provided to SUBCONTRACTOR from the customer.” (10%)	Testing of a smaller number of components is smaller in scope than testing of a larger number of components.
2. “Test the product with its connected peripherals as part of the system (System Level Acceptance Test and Product Level Field Acceptance Test) as installations occur. If the IBM customer provided network, IBM customer provided peripherals or IBM customer provided wiring prevents the system from passing, the testing will be completed without the IBM customer provided	Testing of a smaller number of components is smaller in scope than testing of a larger number of components.

²⁹ See Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, Re: Video FRN, August 16, 2006.

components." (20%)	
3. "Inform the IBM Project Manager that the IBM customer's network is suspected to be the reason for the system not passing. SUBCONTRACTOR will make the IBM Project Manager aware of this fact as soon as it is aware of the issue so that the problems may be resolved. If network issues remain unresolved at the end of the installation schedule, SUBCONTRACTOR will provide product level testing information to the IBM Project Manager at the system sign-off meeting." (5%)	USAC agrees that this task could involve the same level of effort even with the reduction in scope from 90 sites to 53 sites.
4. "Provide system level testing (System Level Acceptance Test) information to the IBM Project Manager." (5%)	Development of information regarding configurations at 53 sites is smaller in scope than such services involved with 90 sites.
5. "Provide the customer with a basic system orientation." (10%)	USAC agrees that this task could involve the same level of effort even with the reduction in scope from 90 sites to 53 sites.

USAC therefore rejects the contention that the costs attributable to three of the tasks would be unchanged with a significant decrease in scope, but accepts IBM's explanation in two cases. According to IBM's information, these two tasks contribute 15% of the original project cost. Therefore, USAC accepts that 15% of the original project cost is attributable to tasks that would not vary with project scope. This leaves 85% of the project that would be affected by project scope. For the portion that would be affected by project scope, IBM uses a factor of 41%, attributable to the number of reduced sites ($90 - 53 = 37$) divided by the original number of sites (90). USAC agrees that this is an appropriate factor for cost allocation.

In addition, IBM indicates that an additional 10% should be recognized as overall project management and design and engineering that "would not have been reduced by a reduction in the number of sites." However, it is mathematically improper to apportion 100% of activities to fourteen tasks, as IBM has done, and then to claim an additional 10% on top of this. Therefore, USAC rejects this factor.

Thus USAC's determination of the labor costs that would remain static regardless of decreased project scope is 15%. The remaining 85% of labor costs can be considered to move proportionately with the scope of the project. The overall project can be divided into three components: (1) Hardware costs; (2) Services for costs not affected by the decreased scope; and (3) Services for costs that are affected by the decreased scope.

IBM has indicated that the hardware cost of the project was originally estimated at \$1,903,053, and this cost was reduced by \$641,762 due to the decreased scope, for a revised hardware total of \$1,261,291 pre-discount, or \$1,135,161.90 post-discount. This reduction of $\$641,762 / \$1,903,053 = 34\%$ tracks roughly with the reduction in project scope of 41% and is accepted by USAC, considering IBM's contention that some centralized hardware would not be eliminated due to the decreased scope.

IBM also indicates that the labor part of the contract was \$2,471,001, which corresponds to a figure of \$2,223,900.90 post-discount at the 90% discount level. Based on USAC's analysis as described above, 15% of this amount can be considered as a fixed cost regardless of the decrease in scope, and the remaining 85% can be considered to move proportionately with the decreased scope. Therefore, the amount attributable to the fixed cost of labor is $\$2,223,900.90 * 15\% = \$333,585.14$.

The proportion of labor costs that are found to vary with the decrease in scope is $\$2,223,900.90 * 85\% = \$1,890,315.76$. With a decrease in project scope from 90 to 53 sites, the costs appropriate for this part of the project are $53/90 * \$1,890,315.76 = \$1,113,185.95$.

Adding these three separate cost components provides a total post-discount cost of $(\$1,135,161.90 + \$333,585.14 + \$1,113,185.95) = \$2,581,932.99$. No more than this dollar amount should have been disbursed by USAC. However, USAC was invoiced and disbursed \$3,324,008.12. Thus $\$3,324,008.12 - \$2,581,932.99 = \$742,075.13$ is the amount of excessive USAC disbursement.

Total Recovery Amount for FRN 648729: USAC will therefore seek recovery of \$742,075.13 from IBM via the Recovery of Improperly Disbursed Funds (RIDF) Letter process.

Web and File Server Funding Request – FRN 648960

USAC funded \$5,850,540 for this FRN and disbursed \$3,374,300 to IBM. USAC requested information about the specific uses of the servers from El Paso ISD in order to determine whether the servers are being used only for eligible purposes. El Paso ISD initially responded that the file servers are used for "web-based access to email and to a file server."³⁰ This response did not provide the information USAC needs to determine whether the file servers are being used only for eligible purposes, and so USAC provided El Paso ISD with an additional opportunity to respond.

³⁰ Letter from Terri Jordan, Executive Director, Technology and Information Systems, El Paso ISD, to Philip Gieseler, Schools and Libraries Division, USAC, August 19, 2005 at 3.

El Paso ISD states that two servers each were installed at 52 sites, for a total of 104 servers.³¹ El Paso ISD further states that although \$5,850,540 was funded for this FRN, they acquired fewer servers than were funded.³² One server at each site was configured as an e-mail server, which the Funding Year 2001 Eligible Services List³³ indicates is eligible for funding. The other server at each site was configured for two purposes – as an authentication server and for “supplementary student file storage.”

USAC concludes the authentication server is eligible for funding in this case. An authentication server provides a login function for network users, by confirming that a user name and password is valid. The Funding Year 2001 Eligible Services List did not specifically indicate that an authentication server is eligible for funding, but USAC concludes that the description provided by the applicant fits is consistent with general eligibility requirements for internal connections.³⁴ As configured, the authentication servers were “an essential element in the transmission of information,” since users must login to the network for transmission to take place.³⁵ However, USAC concludes that the storage of non-e-mail end user files was not eligible under the Funding Year 2001 Eligible Services List.³⁶

Cost Allocation Analysis

Recognizing that eligibility of the student file storage is “subject to dispute,” El Paso ISD submitted a proposed cost allocation based on subtracting the cost of some of the hard disk drives included with the authentication file servers.³⁷ USAC has evaluated the cost allocation and has concluded that it does not meet the necessary standard of being based on “tangible information that provides a realistic result” for the following reasons:

- The file servers consist of many components beyond the hard drives, such as memory modules, central processing unit, case, and cooling fans. All components of the file servers are being used in part for ineligible capability – not just the hard drives.
- Subtraction of hardware cost only is not appropriate because a substantial amount of the FRN cost was for installation and configuration of the file servers.

³¹ Letter from Louis Mona, Interim Executive Director, Technology and Information Systems, El Paso ISD, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, August 19, 2006 at 3 (*El Paso 2006 Letter*).

³² *El Paso 2006 Letter* at 2.

³³ See Schools and Libraries, Eligible Services List at 27 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

³⁴ See Schools and Libraries, Eligible Services List at 21, 26 available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

³⁵ *Universal Service Order*, 12 FCC Rcd at 9021.

³⁶ See Schools and Libraries, Eligible Services List at 26 (January 24, 2001) available at <http://www.usac.org/sl/tools/search-tools/eligible-services-list-archived-versions.aspx>.

³⁷ *El Paso 2006 Letter* at 3-4.

- As an ancillary point, El Paso ISD claims that the hard drive costs are based on January 2002 information, yet it is not clear that the supporting information submitted represents costs during that time period. Actual costs at time of procurement would be higher than current costs.

Therefore USAC has utilized a cost allocation approach that is documented on the USAC website as applicable to file servers, as follows:

Half of the 104 file servers are being used in two ways, one of which is considered eligible and one of which is clearly not eligible. For these partially eligible servers, an acceptable cost allocation is to simply consider the number of eligible uses in comparison to the total number of uses, that is (one eligible use) divided by (two total uses) equals fifty percent eligibility. The full cost allocation for the entire funding request is therefore as follows:

Half of the 104 file servers are fully eligible.
Half of the 104 file servers are 50% eligible.
Therefore, the entire funding request is 75% eligible.
The remaining 25% of the funding request is not eligible.

The amount disbursed by USAC for the 104 file servers, including their installation and configuration was \$3,374,300.00. Since under the cost allocation, 25% of this amount is not eligible, the amount to recover is: $\$3,374,300.00 \times 25\% = \$843,575.00$.

Total Recovery Amount for FRN 648960: USAC funded and disbursed \$843,575.00 for ineligible items. USAC has adjusted the funding commitment and will seek recovery of this amount from both El Paso ISD and IBM because they each share responsibility for the ineligible use. Specifically, El Paso ISD used a portion of the servers for an ineligible use, and IBM was responsible for configuring the servers to allow for the ineligible use.

Maintenance Services Funding Request – FRN 648793

USAC funded \$24,409,530 for this FRN and disbursed the full amount funded to IBM. USAC questioned whether the FRN included substantial ineligible items.³⁸ IBM disagrees that this FRN includes any ineligible items and argues that at the time this FRN was funded, the goods and services were eligible for funding in their entirety.³⁹

At the United States House Committee on Energy and Commerce, Oversight and Investigations Subcommittee hearing held on September 22, 2004 entitled "Problems

³⁸ See September 16, 2004 Letter at 2; Eligibility Analysis (attached) at 5-6.

³⁹ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to George McDonald, Vice President, Schools and Libraries Division, USAC, March 25, 2005.

with the E-rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of our Nation's Schools to the Internet," IBM testified that services outside of eligible basic maintenance were provided as a part of this funding request.⁴⁰ IBM further testified that services were provided for only two and one half months before the end of the last day to receive service for this FRN.⁴¹

In the Universal Service Order, the Commission held that support can be provided for "basic maintenance services" that are "necessary to the operation of the internal connections network."⁴² In the *Ysleta Order*, which was released subsequent to the FRNs at issue here, the Commission directed USAC to ensure that it complied with this holding when it reviewed subsequent funding requests:

When SLD reviews the applications that are submitted after the rebidding occurs, it should ensure that discounts are provided only for "basic maintenance" and not for technical support that falls outside the scope of that deemed eligible in the Universal Service Order." (emphasis added).⁴³

The Commission clarified in the *Schools and Libraries Third Order* that helpdesks that provide a comprehensive level of support beyond basic maintenance of only eligible components are ineligible for funding.⁴⁴ While the *Ysleta Order* and the *Schools and Libraries Third Order* were released by the FCC subsequent to the funding requests at issue here, in these orders the Commission clarified and reaffirmed the essential holding in the original *Universal Service Order*.

USAC has determined, consistent with the *Universal Service Order*, that this FRN included substantial ineligible items. The details related to this FRN indicate that in order to provide the services, IBM created an extensive facility for maintenance support. For example, information submitted to the House Oversight Committee indicates that up to \$16 million of the funding request was used for developing the infrastructure and tools as opposed to the delivery of actual, eligible support services.⁴⁵ The ineligible items are those which were used to create the facility and which are not eligible in themselves. While basic maintenance services of eligible components are eligible, the creation of an extensive support structure for the delivery of those services is not eligible. Services well

⁴⁰ Problems with the E-rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of our Nation's Schools to the Internet Part 3: Hearing before the Subcomm. On Oversight and Investigations of the House Comm. On Energy and Commerce, 108th Cong., pp. 260-262 (2004) (*Hearing Record*).

⁴¹ *Hearing Record*, p. 261.

²⁰ *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8784-85, ¶ 460 (1997).

⁴³ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al. Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Rcd 6858 ¶ 64 (2003).

⁴⁴ *Schools and Libraries Third Order* ¶ 24.

⁴⁵ *Hearing Record*, pp. 260-262, 563-564.

beyond a basic level were provided, as evidenced of cost per site in excess of half a million dollars. USAC has provided ample opportunity for IBM and El Paso ISD to submit specific information in support of their position that only eligible services were provided. However, neither IBM nor El Paso ISD have provided documentation – such as records of the actual services provided – to support their arguments that only eligible services were provided. Additionally, although USAC disbursed the full amount committed for this FRN, IBM states that services were provided for only five and a half months.⁴⁶

Cost Allocation Analysis

In response to USAC's request that IBM provide cost allocation information, IBM – reserving its right to appeal the underlying substantive questions – submitted a cost allocation indicating that consistent with USAC's stated eligibility determinations, \$5,692,208.64 was disbursed by USAC for ineligible items.⁴⁷ USAC has evaluated the cost allocation and has concluded that it does not meet the necessary standard of being based on "tangible information that provides a realistic result" because as explained in greater detail below, some of the assumptions underlying the cost allocation are contrary to information available in this case.

The cost allocation submitted by IBM is based on separating the project into three equally-weighted parts of \$9,040,566.67 (pre-discount): actual repairs, initial setup, and overall project management, with a cost allocation for each of these three parts as follows:

Actual repairs: IBM considers the portion for actual repairs to be 100% eligible.
Initial setup: IBM has further divided this category into nine sections, and has assigned a level of eligibility to each of these nine, from 0% eligible to 100% eligible. IBM has calculated that the resulting

⁴⁶ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, Re Maintenance FRN, August 17, 2006.

⁴⁷ Letter from Bob Richter and Tony Wening, National E-rate Program Executives, IBM Corporation, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC, August 17, 2006, Attachment #1.

⁴⁸ The breakdown indicated by IBM for initial setup of the overall project is as follows:

Task Description	Task Price	Eligible %	Ineligible \$
Network maintenance system design	\$1,004,507.41	25%	\$753,380.56
Detailed implementation design & test environment installation	\$1,004,507.41	0%	\$1,004,507.41
Deployment of network maintenance framework	\$1,004,507.41	25%	\$753,380.56
Deployment of Server and Network Monitoring	\$1,004,507.41	50%	\$502,253.70
Inventory	\$1,004,507.41	100%	\$0
Maintenance event consolidation and automation	\$1,004,507.41	50%	\$502,253.70
Help desk problem + change maintenance function	\$1,004,507.41	25%	\$753,380.56
User administration	\$1,004,507.41	100%	\$0

ineligible cost from this section is \$4,269,156.49. ⁴⁸
Project management: IBM indicates that it has allocated overall project management "in the same proportion as the ineligible portion" of the initial setup costs. However, due to a mathematical error, IBM incorrectly concludes that the resulting ineligible cost is \$1,423,052.16, whereas the actual ineligible cost for project management using their methodology would be \$2,134,578.24. ⁴⁹

In total, once the mathematical error is corrected, the IBM methodology indicates that \$6,403,734.73 (pre-discount) would be cost allocated from the FRN. (\$4,269,156.49 + \$2,134,578.24 = \$6,403,734.73). On a post-discount basis, the recovery amount under this formulation would be \$6,403,734.73 * 90% discount rate = \$5,763,361.26, which is 23.6% of the disbursed amount of \$24,409,530.00.

Cost Allocation Analysis

In determining whether the IBM methodology is consistent with the standard of "tangible information that provides a realistic result," USAC has considered whether the cost allocation framework proposed is acceptable. In particular, USAC has evaluated whether the approach of dividing the full project into three equally-weighted components is valid. USAC's June 19, 2006 letter specifically indicated the acceptability of such an approach if each of the "components to the funding request involved about the same level of effort." In other cases, USAC indicated that an appropriate approach would "include weighting for the level of effort utilized for each of the component parts."

In this case, the information available indicates that an equal weighting of the categories identified by IBM is inconsistent with the actual proportion of eligible and ineligible services rendered for the following reasons. First, ~~IBM concedes that actual repair services during the fifteen-month period from July 1, 2001 through September 30, 2002 were performed for only the last 5 and a half months of this period of time.~~ The date of USAC's Funding Commitment Decision Letter was September 28, 2001, and so it is reasonable to expect that the funding commitment should be used for maintenance services over 12 months. If service was only provided for a lesser time period, then the

Remote control	\$1,004,507.41	100%	\$0
The amount shown by IBM as ineligible initial setup is 47% of all expenses categorized as initial setup.			

⁴⁹ IBM indicates that the project management category is allocated in the same proportion as "the ineligible portion...of the 'Technical Support Office Initial Setup.'" The ineligible portion of the Technical Support Office Initial Setup is \$4,269,156.49, as shown in the previous footnote. However, IBM appears to have incorrectly included the one-third cost of the project management category (\$9,040,566.67) in the calculation of these very project management costs, which is mathematically incorrect. IBM's calculation appears to be \$4,269,156.49 divided by (\$9,040,566.67 + \$9,040,566.67 + \$9,040,566.67) whereas a more accurate calculation would be \$4,269,156.49 divided by (\$9,040,566.67 + \$9,040,566.67). This latter calculation, which comes to 23.6%, is used to develop the corrected ineligible portion of project management expenses according to the IBM formulation of \$2,134,578.24. (The total project management portion of \$9,040,566.67 times the ineligible factor of 23.6% equals \$2,134,578.24.)

full cost of the FRN should not have been disbursed. Therefore, the methodology used by IBM cannot be accepted because the proportion of time that actual maintenance services were not provided ($6.5 \text{ divided by } 12 = 54\%$), is much larger than the 23.6% figure that comes from IBM's cost allocation methodology.

Second, the record before the House Committee indicates that approximately \$16 million of the funding request was used for "tools" as opposed to actual support services.⁵⁰ The information available indicates that a significant portion of the funding request was used to create the support facility, rather than implement actual repair services. Consequently, the information available does not support a cost allocation approach that is based on only a portion of one third of the funding request being attributed to the substantial and ineligible original creation of a support structure. This conclusion is reinforced by clear descriptions in the Statement of Work that ineligible services were to be included. Since the \$16 million figure is 59% of the full funding request, which is much larger than the 23.6% figure that comes from IBM's corrected cost allocation figures, IBM's methodology cannot be accepted.

Third, IBM assigns a project management expense that is one-third of the entire project, and equal to the expense for repair costs. Under appropriate project management techniques and reasonable standards for good business practices, it is not reasonable to assign a project management expense for maintenance services that is equal to the costs of the actual repairs. Furthermore, IBM has provided no specific information that would support their assumption of one third of the full cost being attributable to project management.

For these reasons, USAC rejects IBM's cost allocation because the information available does not support equal weighting of project management, repair costs, and technical support office initial setup.⁵¹

In making this determination, USAC emphasizes that IBM has failed to provide specific information about the personnel involved for various parts of the project, the non-personnel costs, or other information that would substantiate the amount of actual support service costs in comparison to the ineligible costs expended in order to reach a capability for providing those support services. IBM has provided eligibility arguments, but has failed to provide specific information about the extent and type of services actually delivered.

When a cost allocation to subtract ineligible components is not available, USAC generally seeks recovery of the full disbursed amount. However, because IBM has

⁵⁰ Hearing Record, pp. 260-262, 563-564.

⁵¹ Because USAC finds that this equally-weighted approach cannot be accepted, USAC does not reach an analysis of IBM's breakdown of initial setup expenses as 53% eligible and 47% ineligible, but notes that such an analysis, if conducted, might reach different results than that indicated by IBM.

provided some information, USAC will formulate a cost allocation based on the information provided.

USAC's cost allocation first considers the limited period of time that repair services were actually utilized – ~~5 and a half months out of the 12 months~~ for which funds were disbursed. This corresponds to a factor of 46% (5.5 divided by 12), that is applicable for the time period eligible services were provided. Additionally, the record establishes that ineligible support services – such as ineligible end user support and ineligible network monitoring and management – were provided. However, neither IBM nor El Paso ISD provided specific details to establish the proportion of these ineligible services to any eligible services.

USAC has evaluated the January 18, 2001 contract for maintenance services to provide a basis for a cost allocation for the maintenance services provided. Absent specific information provided by IBM, and because no contrary information has been provided by IBM, USAC will use a basic cost allocation approach that identifies the total number of tasks, and classifies the tasks that are not eligible or only partially eligible.

The documentation provided to USAC consists of an Executive Overview, a Statement of Work (labeled Section 2), and appendices, with the descriptions of specific tasks performed in the Statement of Work section. Section 2.3 describes the activities of the Maintenance Support Office, with additional subsections as follows:

- 2.3.1 Maintenance Project Coordination
- 2.3.2 Call-in Dispatch/Technical Maintenance Support
- 2.3.3 Systems Maintenance Function Implementation

Subsection 2.3.2 provides a listing of 17 separate tasks, and provides the principal basis for a cost allocation.⁵² In addition, subsection 2.3.3 outlines certain implementation activities that also identify ineligible features.

The 17 tasks identified in subsection 2.3.2, and USAC's determination of ineligible activities, is provided in the table below. USAC's determination of partial or full ineligibility is limited to circumstances in which the determination is clear.

<u>Statement of Work Task</u>	<u>USAC Comment</u>
1. Take incoming calls from El Paso ISD users	Some calls were for ineligible end user support—partially ineligible

⁵² The opening narrative for Section 2.3 also provides a listing of the work to be performed. However, since this listing appears duplicative in many respects to the information in subsection 2.3.2 it is not separately evaluated.

2. Learn/understand/support El Paso ISD hardware and operational configurations	
3. Serve as initial point of contact for support, maintenance and problem resolution	Some contacts were for ineligible end user support—partially ineligible
4. Provide systems support for servers, switches, routers, and other network components	
5. Provide “ownership to resolution” of all network problem calls, monitor and report on the progress of problem resolution (through the monthly MSO activity report), confirm resolution of the problem with the end user, and log final resolution via the maintenance tool.	
6. Prioritize problem resolution in accordance with documentation developed by IBM and agreed to by El Paso ISD	
7. Provide system status messages as requested	
8. Provide web maintenance support	
9. Monitor problem status to facilitate problem closure	
10. Provide problem diagnosis and levels one/dispatch call-in support, level two/advanced network maintenance support, and level three/advanced network maintenance support technical support	
11. Coordinate problem resolution with escalation to appropriate skill level technical resources toward problem resolution goals	
12. Maintain documentation of problem and ‘own’ problem resolution for in-scope activities, defined as: <ul style="list-style-type: none"> • Netfinity servers (number to be stipulated) • RS 6000 servers (to be stipulated) • Workstation support related to the network (approximately 10,000 workstations) • Networking hardware and configuration support (Disco networking equipment located in up to 90 buildings) • Dial-up/direct connections to the Internet • Network connectivity between buildings 	Workstation support is not eligible—partially ineligible
13. Perform appropriate ‘hand-off’ of out-of-scope work functions (i.e. PC workstation warranty work)	No PC workstation work is eligible—not eligible
14. Report out of scope activities to project office for proactive interaction with El Paso ISD resources to minimize future occurrences	Some reporting was for PC workstation work—partially ineligible
15. Assist in the resolution of in-scope functions via telephone	

support or on-site network related support through problem resolution	
16. Dispatch dedicatee maintenance field technical resources and track activities through network problem resolution	
17. Dispatch and manage extended field technical network resources and track activities through network problem resolution	

Based on the information available, USAC has determined that four of the tasks are partially ineligible, and one task to be fully ineligible. USAC considers the remaining tasks to be eligible based on the information available at this time. Counting every determination of "partially ineligible" as a finding at the level of 50% ineligible, or 17.6% (3 divided by 17), of the tasks are not eligible.

In addition, subsection 2.3.3 describes the features implemented as part of the overall maintenance design. Additional subcategories, and USAC's evaluation of each of them, are provided in the table below.⁵³

<u>Task</u>	<u>Comment</u>
2.3.3.1 Network Maintenance Systems Design	
2.3.3.2 Detailed Implementation Design and Test Environment Installation	
2.3.3.3 Deployment of Network Maintenance Framework	
2.3.3.4 Deployment of Server and Network Monitoring	Network monitoring is fully ineligible ⁵⁴
2.3.3.5 Inventory	
2.3.3.6 Maintenance Event Consolidation & Automation	
2.3.3.7 Help Desk Problem and Change Maintenance Function	
2.3.3.8 User Administration	

⁵³ Lack of USAC comment for this table and the previous table are not to be interpreted as an indication that USAC has necessarily determined that the item has been found to be eligible. In some cases, such as subsection 2.3.3.1, the network architecture design function has been found to be not eligible, but is discussed and cost allocated separately from this part of the analysis.

⁵⁴ See Schools and Libraries, Eligible Services List at 22 (January 24, 2001) available at http://www.usac.org/sl/tools/search_tools/eligible-services-list-archived-versions.aspx.

2.3.3.9 Remote Control	
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Using the same approach as indicated for the previous table, the ineligible network monitoring would account for 11.1% (1 divided by 9), of the work.

Adding the two areas of ineligible support services provides a finding of 28.7% ineligible (17.6% + 11.1% = 28.7%).

Total Recovery Amount for FRN 648793: USAC concludes that the disbursed amount of \$24,409,530.00 should be pro-rated for the amount of time services were delivered totaling \$11,228,383.80 ($\$24,409,530.00 \div 5.5 = \$11,228,383.80$). The ineligible support services would occur over the entire period of time because there is no indication in the record that these services were delivered at the beginning of the service delivery period and therefore require cost allocation for the amount of \$3,222,546.15 ($\$11,228,383.80 \times 28.7\% = \$3,222,546.15$). Thus, the total amount of recovery is \$16,402,072.35 ($\$24,409,530 \times 54\% + \$3,222,546.15 = \$16,402,072.35$).

Schools and Libraries Division
Universal Service Administrative Company

cc: Bob Richter
National E-rate Program Executive
IBM Corporation
166 Deer Run
Burlington, CT 06013

John A. (Tony) Wening
National E-rate Program Executive
IBM Corporation
2330 Lakewood Road
Jefferson City, MO 65109

Terri Jordan
Executive Director
Business Services, Technology and Information Systems
El Paso Independent School District
6531 Boeing Drive
El Paso, TX 79925

Exhibit I

Letter from David R. Tillman, Project Manager, IBM, to Jack Johnston, Executive Director, Technology and Information Systems, EPISD, “Universal Services Fund Maintenance Services IBM Contract #CFT55SH, Work Order #C6SJK, Customer #2760274” (June 28, 2002).*

Letter from John Milota, IBM, to Jack Johnston, EPISD, “Letter of Authorization” (June 28, 2002).*

* The original executed copies of these letters appear to have been lost through the passage of time, but the copies supplied in this Exhibit show the final text of each.

USF Maintenance Services Board Approval

MR. JACK JOHNSTON
EXECUTIVE DIRECTOR, TECHNOLOGY & INFORMATION SYSTEMS
EL PASO INDEPENDENT SCHOOL DISTRICT
6531 BOEING DRIVE
EL PASO, TX 79925-1086

June 28, 2002

SUBJECT: UNIVERSAL SERVICES FUND MAINTENANCE SERVICES
IBM CONTRACT # CFT55SH, WORK ORDER # C6SJK, CUSTOMER # 2760274

Dear Mr. Johnston,

IBM has completed its responsibilities as outlined in the USF Maintenance Services Statement of Work (SOW), Contract # CFT55SH. We prepared and delivered to Fred Alvarez each of the deliverables as outlined in the SOW. The seventh and final billing was done on June 12, 2002 in the amount of \$3,390,121.50. The total billing for this engagement is \$27,121,700.00.

Please sign and return the acknowledgement below. It has been a pleasure working with you and your staff, and I would like to thank you personally for allowing IBM to provide you with this service. If we can assist you further, or if you have any questions, please contact me.

Sincerely,

David R. Tillman
Project Manager
IBM Global Services

I acknowledge that IBM has satisfied all its requirements under the USF Maintenance Services SOW, Contract # CFT55SH.



International Business Machines Corporation
IBM Global Services
4100 Rio Bravo, Suite 104
El Paso, TX 79902

June 28, 2002

El Paso Independent School District
6531 Boeing Drive
El Paso, TX 79925-1086

Attention: Mr. Jack Johnston
Executive Director, Technology & Information Systems
Subject: Letter of Authorization

Dear Mr. Johnston:

This Letter of Authorization (this "Letter") authorizes International Business Machines Corporation ("IBM"), through its division IBM Global Services, to begin providing *E-rate Funding Year 2002 (E-rate 5) USF Technical Support Services* to the El Paso Independent School District (EPISD). This authorization specifically relates to the E-rate proposal as outlined in IBM's Statement of Work titled "IBM Statement of Work for USF Technical Support", dated January 17, 2002 (Agreement). While funding is pending for this Agreement, you have requested that IBM begin initial work activities in an effort to meet your estimated schedule requirements. Accordingly, IBM and EPISD agree to the following:

1. This letter of authorization permits IBM to start work on the USF Technical Support Services Statement of Work. IBM will

- Continue operation of the Technical Support Office (TSO), including the delivery of the Monthly TSO Activity Report and the TSO Call Report
- Continue to provide Program Management support
- Continue to execute the Communications Plan started under the E-Rate 4 USF Maintenance Services SOW
- Continue to provide Network Architecture support
- Perform due diligence activities on the SOW to validate and prioritize EPISD's requirements for E-Rate 5 support.

2. The services will be provided by IBM under the terms and conditions of the IBM Customer Agreement #NB8C298, between El Paso ISD and IBM. If there is a conflict between the terms of this Letter and those of the ICA, those of this Letter shall prevail.

3. The agreement documented by this Letter will conclude upon the earlier to occur of one of the following events:

- a. termination of work under the Agreement, which termination shall be made by written notice given by either party to the other. IBM will stop all work upon receipt of such written notice; or
- b. if USF funding is not secured by 10/31/02, and no other arrangements for continuation of the work have been made. In this event, IBM will not invoice EISD for any costs associated with the Technical Support services provided.

4. When funding is secured, the terms of the Agreement shall supersede the provisions of this Authorization. EPISD agrees to process any required internal authorizations for payment, such as purchase orders according to an overall billing schedule based on 12 equal monthly payments retroactively starting July 1, 2002. Should final funding arrangements reflect a business requirement for modification of the Service levels and/or resources, IBM will work with EPISD to arrive at a mutually satisfactory solution. EPISD agrees to pay all invoiced amounts as specified in the invoice.

5. Neither party shall make a claim against, nor be liable to, the other for any damages, including without limitation, any consequential, special, incidental or punitive damages or lost profits, suffered by it because of either party's performance or failure to perform any of its obligations relating to the subject matter of this Letter. The foregoing provision does not, however, relieve the Customer of any obligation it may have under paragraph 5 of this Letter.

This Letter is the complete and exclusive statement of the agreement between the parties concerning the subject matter hereof, and supersedes all prior oral and written understandings related thereto. This Letter cannot be modified or superseded except by a writing signed by both parties. This Letter shall be governed by and construed in accordance with the laws of the state of Texas.

IBM looks forward to a mutually beneficial relationship with the El Paso Independent School District.

Please sign and return a copy of this Letter acknowledging your agreement with the above. Should you have any questions regarding this Letter, please contact me at 915-842-1499.

Approved and Agreed to by: **IBM Corporation**

By: _____

John Milota

Title: Project Executive

Date: June 28, 2002

Approved and Agreed to by: **El Paso Independent School District**

By: _____

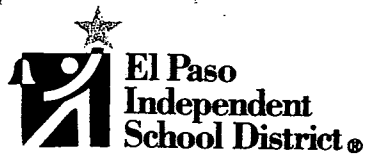
Jack Johnston

Title: Executive Director, Technology & Information Systems

Date: June 28, 2002

Exhibit J

Letter from Jack S. Johnston, Executive Director, Technology and Information Systems, EPISD, to Mathen Varughese, SLD (Sept. 14, 2001).



*Technology and Information Systems
Executive Director*

September 14, 2001

Mr. Mathen Varughese
Schools and Libraries Division

Dear Mr. Varughese:

In response to your questions on Application # 256606, FRN 648993, I am offering the following clarification for your consideration.

IBM performs no work on PC workstations. All out of scope work functions, i.e. PC workstations, are performed by El Paso Independent School District's employees. IBM does not perform any work on PCs or other end-user equipment under FRN 64899.

Sincerely,

A handwritten signature in black ink that reads "Jack S. Johnston". The signature is written in a cursive, flowing style.

Jack S. Johnston
Executive Director

FAX Transmission

From:	Michael J Pratt	IBM Global Services - Houston
Questions?	Call: 713-940- 1410 2116 Fax: 713-940-1202 1499	Two Riverway, 17th Floor Houston, Tx 77056-1395
To:	MR JACK JOHNSTON	
Phone:	915-779-4235	
Fax:	915-779-4100	
Date:	9/13	
Time:		Pages: (including this one):

Message:

JACK,
PER MY EMAIL, HERE IS
THE SIGNED HARD COPY SLD RESPONSE.

THX.

Mike



International Business Machines Corporation
Two Riverway
Houston, TX 77056

September 13, 2001

Jack Johnston
Executive Director,
El Paso Independent School District

Dear Jack:

Per your request below is the response to the SLD's request for information (Application # 256606, FRN 648993). If you have any questions please contact me at 713-940-2116.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike".

Michael Pratt
Complex Engagements Manager
Integrated Technology Services
IBM Global Services

SLD Question:

EPISD USF maintenance services by IBM - contained in the contract "Perform appropriate 'hand-off' of out of scope work functions (i.e. PC workstation warranty work)."

Need a cost breakdown or a % of the total maintenance associated with PC workstation work.

I would very much appreciate if you can provide the above information at your earliest convenience. If you have any questions, please call me on (973) 581-6724.

IBM Answer:

IBM performs no work on PC workstations! All out of scope work functions, i.e. PC workstations, are performed by El Paso Independent School District's employees. IBM does not perform any work on PCs or other end-user equipment under FRN 648993.

Exhibit K

Draft Attachment to FCC Form 471 Application, “Video Group Equipment,
Attachment #V.”

Attachment #V**Video Group Equipment**Vendor: **IBM Corporation**

The Cisco video group equipment is used to control the programming, distribution and selection of video conferencing.

Name	Model	Quantity
Cisco IP/TV Broadcast Server	3423	2
Cisco IP/TV Control Server	3411	2
Cisco IP/TV Viewer Software (Free)		14,000
Cisco IP/TV Viewer Software (Fee with MPEG2)		14,000

Cisco Content Distribution Manager 4650

1. One 866-MHz Pentium III Xeon microprocessor
2. Front side bus (FSB) with an external bus speed of 133 MHz
3. 1 GB of system memory SDRAM
4. Eight 18-GB SCSI hard disk drives
5. Three independent power supplies
6. Hot-pluggable fans that run independently
7. The CDM-4650 manages up to 1000 Content Engines and has the following software features:
 - Device manager with remote software update capability
 - Channel manager licensed for 100 channels
 - Bandwidth manager
 - Media importer with Web page creation capability
 - Media previewer with test streaming capability
 - Media replication engine with Self-Organizing Distributed Architecture (SODA) router
 - Replica router for Content Engine selection

Cisco Content Engine 507

1. TV-quality streaming media
2. Advanced transparent caching service
3. Powerful Employee Internet Management (EIM)

Name	Model	Quantity
Cisco Content Distribution Manager	4650	2
Cisco Content Engine (with extra Hard Drive)	507	135

- FVC.COM Codec V-Station

FVCC.COM's V-Station is a Codec and associated equipment used to control distribution, selection of video broadcast with integrated, high performance video networking system with full-featured interactive and streaming video support.

CODEC SPECIFICATIONS –

1. Call Types: H.320 switched over ATM (H.321). Standard telephone (voice).
2. Call Control: Caller ID, idle call disconnect, dynamic call bandwidth, communication call status, speed dial, comprehensive phone book, call forward and transfer.
3. Audio: Automatic device selection, level indicators, automated gain control, noise suppression, full duplex echo cancellation at -60db.
4. Video Standards: H.281 far end camera control, image control, still capture/restore.
5. Audio Standards: G.711 A Law and U Law, G.722, G.728 Frequency Response: 300 Hz to 7.1 KHz for G.722, 300 Hz to 3.4 KHz for G.711 and G.728 Video Outputs: VGA up to 1280 x 1024 at 72 Hz refresh rate, 16.7 million colors, separate self view, RS232 camera control, dual monitor option
6. Frame Rate: 15 fps at CIF, 352 x 288 pixels, 30 fps at QCIF, 176 x 144 pixels, still image CIF transfer
7. Room Quality: Low delay, 225 ms end-to-end, room quality at 384Kbps to 1920Kbps

- FVC.COM V-Gate 4000 Gateway

SCALABLE VIDEOCONFERENCING GATEWAY FOR IP, ISDN, AND/OR ATM –

1. The V-Gate 4000 is a scalable, multi-protocol gateway that enables seamless videoconferencing between IP (H.323) standards, ISDN (H.320) and ATM (H.321).
2. Extends videoconferencing from high-end room systems to desktop. Scalable configurations suit your needs now and in the future.
3. Network intelligence improves efficiency and reduces costs.
 - Size: 7" H x 17 1/2" W x 18" D (177.8mm x 431.8mm x 457.2mm)
 - Weight: 37 lbs. (16.78 kilograms)
 - Mounting: Desktop or 19-inch rack (482.6mm)
 - Power Requirements: 100 V AC -240 V AC/47-63 Hz
 - Maximum Power Consumption: 250 watts
 - Operating Temperature: 10° to 40° C
 - Storage Temperature: -20° to 65° C

- Relative Humidity: 20% to 80%, non-condensing
- FVC.COM – V-Conference SP
 1. The V-Conference SP is a fault-tolerant, multi-point conference bridge with the scalability required by service providers and large enterprise customers
 2. Designed for high availability and simplified maintenance
 3. Highest capacity MCU on the market
 4. Drag-and-drop management features and auto-adaptive transcoding

SPECIFICATIONS -

- Data Rate: 56Kbps to 1920Kbps
- Network Services/Interfaces: T1/E1, ISDN PRI, ISDN BRI, ATM OC-3
- Clocking: Synchronizes to external network
- Conference Control: Director selection, ITU-T H.243 chair control, voice-activated selection
- Diagnostics: 6B, audio, audio/video, digital, IMUX, internal, network interface, tone, and video loopback

STANDARDS -

- Communications: H.221, H.242, H.243 chair control, H.231, H.281 for end camera control
- Audio: G.711, G.722, G.728
- Data: H.243, LSD, T.122/T.125 (MCS), T.123, T.124 (GCC)
- Video: H.321, H.320, H.261, H.263

Quantities:

Name	Model	Quantity
FVC.COM – V-Gate 4000 Gateway	VGS- 4100-11	2
FVC.COM – V-Conference SP	VCU-SP152/8	1
FVC.COM Codec V-Station	BVS-012	144

Total one time charges \$8,963,489.00

Exhibit L

Letter from Louis Mona, Interim Executive Director, Business Services,
Technology and Information Systems, EPISD to Mel Blackwell, Vice
President, SLD (Aug. 19, 2006).



Business Services
Technology and Information Systems
Interim Executive Director

August 19, 2006

Via E-Mail (mblackwell@universalservice.org)

Mel Blackwell
Vice President
Schools and Libraries Division
2000 L Street, N.W., Suite 200
Washington, D.C. 20036

Re: El Paso Independent School District Funding Year 2001
FCC Form 471 No. 256606

Dear Mr. Blackwell:

On behalf of the El Paso Independent School District (the "District"), I have been asked to respond to the letter of June 19, 2006 from you addressed to Terri Jordan, the former Executive Director of Technology and Information Systems for the District (the "June 19 Letter"). I am the Interim Executive Director of TIS for the District; any further correspondence from the Universal Service Administrative Company ("USAC") or the Schools and Libraries Division ("SLD") regarding this matter should be addressed to my attention. USAC/SLD, through Philip Giesler, had graciously agreed to extension of the deadline for this response, in light of the circumstances discussed previously, and this response is being timely made.

The June 19 Letter seeks information from the District and its service provider IBM Corporation ("IBM") regarding Year 4 a/k/a Funding Year 2001 of the E-Rate Program (the "Program"). The June 19 Letter requests that the District respond to questions regarding a single funding request, and requests that IBM respond to questions regarding other funding requests. The District, in this letter, intends to respond only to those requests specifically directed to the District in the June 19 Letter and to not address other issues raised in the June 19 Letter and any IBM responses thereto and reserves the right to comment further on those other issues if and as requested or warranted.

The June 19 Letter requests information from the District on whether and to what extent the award made in Year 4 of the Program to the District for the Web and File Server portion of FRN 648960 were in fact eligible for funding under the Program (the "Web and File Server Project"). USAC/SLD has asked in the June 19 Letter for the District to identify uses made of the servers acquired by the District under the Web and File Server Project (the "Servers") and to propose a cost allocation based upon eligible and ineligible uses of the Servers.

Insofar as this response is focused on a single project, the District has had the opportunity to undertake a more comprehensive review and analysis than previously done in connection with prior replies to USAC/SLD inquiries. In addition, the District also now has a better understanding of the information being sought by USAC/SLD. As such, the District believes that this response is more complete and accurate than those earlier ones, and they should be considered amended and supplemented by this response.

USAC/SLD made an award of \$5,850,540 to the District under the Web and File Server Project. The District acquired a total of 104 Servers under the Web and File Server Project. The number of Servers acquired by the District, however, was significantly less than originally contemplated in the Form 471 application. Upon further review and investigation, the District determined that fewer Servers were needed for the Web and File Server Project, even though monies had been awarded for a greater number of Servers. Consequently, even though the District was awarded \$5,860,540 for the Web and File Server Project, only \$3,374,300 was actually disbursed by USAC/SLD.

The District believes that all goods and services provided to the District under the Web and File Server Project were eligible based upon rules in place at the time. As you should be aware, eligibility rules and classifications under the Program are periodically changed, and differ significantly from those in place when the Year 4 application was made and award granted. At minimum, Program eligibility rules have been clarified greatly since that time. The ambiguity and complexity of Program rules at the time can be further illustrated by the fact that IBM, one of the [if not the] largest and most-established technology companies in the world, felt compelled to retain an E-Rate consultant, Alpha Communications, to advise it as to Program rules. Additionally, the SLD's approval of the application after review of the detailed back-up information, as well as the SLD's later payment of reimbursement claims after review of the detailed supporting materials, was itself an indication that the SLD at the time also believed eligibility of those items to be clearly established. Moreover, at the time [and later criticized by the FCC in the Second Report and Order and Notice of Further Rulemaking, No. 03-101], the eligibility classifications and rules for the Program, particularly as to internal connections, were not as complete and/or readily accessible to the public as may have been warranted.

In Year 4 of the Program, the District also relied heavily upon IBM, and indirectly upon IBM's E-Rate consultant, Alpha Communications, for consultation and advice on the eligibility of goods and services to be provided. The District did not seek to acquire any ineligible items under the Program, and sought confirmation of eligibility of goods and services from IBM and Alpha Communications based upon the proposed uses, especially in situations where the limited SLD eligibility classifications were vague or ambiguous. In a number of cases, the District was advised that, upon review, certain goods or services were not eligible. Consequently, as is well-known to the SLD, the District made numerous changes in project features, resulting in both a reduction in the scope of Program goods and services to eliminate ineligible items as well as an appropriate reduction in the money sought and obtained under the award, and in some cases instead acquired the ineligible items using its own funds. Quite simply, if an item was acquired by the District under Year 4 of the Program, eligibility had been reviewed with IBM and/or Alpha Communications.

The District acted reasonably and in good faith in its efforts to ensure that Year 4 goods and services, including without limitation those under the Web and File Server Project, were eligible under Program rules.

Based upon its more comprehensive review and analysis of eligibility for the Servers, and in light of subsequent ex post facto clarifications as to Program rules, however, the District now believes that the eligibility of some uses of the Servers is subject to dispute. As noted, the District had been originally advised that all such uses were eligible. In light of the subsequent Program clarifications and corrections, eligibility is partly subject to dispute. Therefore, the District has prepared a cost-allocation between eligible uses and uses whose eligibility is in dispute, based upon tangible criteria providing a realistic result.

Specifically, 104 Servers were deployed at 52 District sites, with a total of two Servers installed at each site. 52 Servers [1 per site] are configured as student e-mail servers, providing access to student e-mail accounts through a Web interface. This functionality is 100% eligible per the applicable Eligible Services List, and the District does not believe that these charges are in dispute. The e-mail server software requires no per-user or per-mailbox access license or fee. However, the software runs on the Microsoft Windows 2000 platform, which does require a Client Access License ("CAL") for each connected user. Due to the large number of students to be served [and, subsequently, the large number of Windows CALs necessary for students to access e-mail], a more cost-effective approach to user authentication was initiated by the District.

The 52 remaining Servers [1 per site] are deployed as authentication servers, acting as a proxy to the Windows-based e-mail Servers. These authentication Servers are configured on the Novell NetWare operating system, which does not require a CAL or similar per-user fee. In this manner, the District can authenticate its student user base without the need to purchase a Windows CAL for each user. This configuration proved to be the most cost-effective method of authenticating users for e-mail access.

The Novell authentication Servers are, however, also configured for supplementary student file storage, which is ineligible for discount per the applicable Eligible Services List. The District therefore recognizes that a portion of the cost of each Novell authentication Server is subject to challenge. Because the Novell Servers are otherwise required for e-mail authentication, the District believes that only the component cost of the file storage [i.e.- hard drive capacity] of each Server may be disputed. Each Server was configured with four 36GB SCSI hard drives. The cost per drive in January 2002 was \$431.95 [see Attachment A], for a total storage cost per server of \$1,728.80. In order to cost-allocate the ineligible storage capacity of each server, the District compared the "as-delivered" Server configuration with the same Server configured only with adequate storage capacity for the eligible authentication functionality [i.e. - two 18GB hard drives per Server]. The cost breakdown and allocation is as follows:

As Delivered Configuration

36GB SCSI Drive, January 2002	\$	431.95
Drives per server		<u>4</u>
Cost of total storage capacity per server	\$	1,727.80

Minimal Configuration for Authentication Functionality

18GB SCSI Drive, January 2002	\$	227.95
Drives per server		<u>2</u>
Cost of total storage capacity per server	\$	455.90

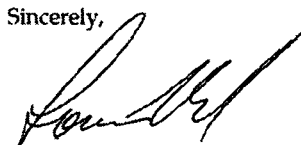
Cost-Allocation

Cost attributable to ineligible file storage capacity	\$	1,271.90
Number of affected Servers		<u>52</u>
Total Amount in Dispute	\$	66,138.80.

Consequently, it is the District's current belief that, at most, the eligibility of \$66,138.80 [i.e.- \$1,271.90 per authentication Server] of the funds disbursed for the Web and File Server Project is subject to challenge.

Thank you for your consideration. Please contact me immediately if the SLD or you have any questions or comments regarding the foregoing, or if additional information or materials are needed. As noted on many occasions by many authorities, the District has provided extraordinary cooperation to the SLD on issues arising from Year 4 and Year 5 of the Program, and is again willing to continue to do so as necessary and appropriate.

Sincerely,



Louis Mona

Enclosure

Copy to: Lorenzo Garcia, Superintendent
Clyde A. Pine, Jr.
Philip Gieseler (pgieseler@universalservice.org)